Courts do, however, "sometimes fail[] to distinguish" the fiduciary shield from the related "no-imputed-contacts rule," which, in sharp contrast, *is* "integral to the minimum contacts due process test." *Newsome*, 722 F.3d at 1275–76. This black-letter rule simply holds that a court's "jurisdiction over an employee does not *automatically* follow from jurisdiction over the corporation which employs him[.]" *Keeton*, 465 U.S. at 781 n.13 (emphasis added). Instead, each employee's contacts with a forum "must be assessed individually," on their own merits. *Calder*, 465 U.S. at 790; *see also Walden*, 571 U.S. at 286 ("[A] defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.").[4]

In reanimating the fiduciary shield, the district court's opinion conflicts with Supreme Court precedents and the weight of case law rejecting the theory as a part of federal due process. But the court is not alone. Various courts in this district have followed the lead of a similar opinion by the district court, *Wiggins v. Equifax Inc.*, 853 F. Supp. 500 (D.D.C. 1994), which at least espoused elements of the fiduciary shield. *See, e.g.*, *Richard v. Bell Atl. Corp.*, 976 F. Supp. 40, 50 (D.D.C. 1997) ("[T]he plaintiffs have failed to plead sufficient jurisdictional facts, because acts committed within the scope of employment cannot be imputed to the individual defendants to

[4] The district court seems to have comingled these different concepts. It characterizes CEO Mobley's individual contacts with D.C. as "Cushman & Wakefield's," and then holds that these contacts cannot be attributed (or imputed) back to CEO Mobley for personal jurisdiction unless he "exceeded his corporate responsibilities." JA42. To be clear, Ms. Urquhart-Bradley does not ask that the entirety of the Company's contacts with D.C. be imputed to CEO Mobley. She only argues that the personal jurisdiction analysis should properly weigh any D.C. contacts relating to his own activities as an individual, including those taken under his "corporate responsibilities."

establish personal jurisdiction over them."). This Court should conform this Circuit with the Supreme Court's precedents and bury the fiduciary shield as a matter of constitutional law.

2. The D.C. Court of Appeals has shunned the "corporate" or "fiduciary" shield rule as a matter of District law.

D.C. has not adopted the corporate or fiduciary shield as a matter of local law, thus the doctrine cannot otherwise thwart jurisdiction over CEO Mobley. *See Newsome*, 722 F.3d at 1276 ("[I]f the fiduciary shield doctrine exists at all, it must be a matter of state law—such as a judicial rule of construction for interpreting the intended scope of a state's long-arm statute." (internal quotation marks omitted)). Instead, the D.C. Court of Appeals has "repeatedly reaffirmed that the transacting business provision of the District's Long Arm Statute is coextensive with the due process clause of the Fifth Amendment . . . . [T]hat is, jurisdiction extends as far as the due process clause permits." *Family Fed'n for World Peace v. Hyun Jin Moon*, 129 A.3d 234, 242 (D.C. 2015) (internal quotation and alteration marks and citation omitted); *Shoppers Food Warehouse v. Moreno*, 746 A.2d 320, 330 (D.C. 2000) (Section 13-423(a)(1) "is co-extensive with the due process clause of the fifth amendment, and . . . *its construction is subsumed by a due process analysis*.").

In three cases, the court has referenced a "so-called corporate fiduciary shield." *Family Fed'n*, 129 A.3d at 243; *Daley v. Alpha Kappa Alpha Sorority, Inc.*, 26 A.3d 723, 728 n.3 (D.C. 2011); *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 163 n.20 (D.C. 2000). Each time it has warily kept the concept at arm's length, hewing only to a due process analysis for personal jurisdiction questions.

Most recently, when the non-resident directors of a non-profit in *Family Federation* sought to avoid the court's jurisdiction, it framed the analysis under *International Shoe, Co. v. Washington*, 326 U.S. 310 (1945), as "whether maintenance of the suit against defendants offends 'traditional notions of fair play and substantial justice.'" *Family Fed'n for World Peace*, 129 A.3d at 243 (internal quotation and alteration marks omitted). In this due process analysis, the court paused to address "the so-called corporate fiduciary shield," *id.* at 243, and reaffirmed that: "[h]owever the doctrine may operate in normal circumstances, we have declined to adopt an 'absolute fiduciary doctrine' that would amount to 'a per se rule that an employee's acts in his official capacity may never give rise to personal jurisdiction over him.'" *Id.* (quoting *Flocco*, 752 A.2d at 163 n.20). Echoing *Burger King*, the court emphasized: "our analysis is not a 'mechanical test'; instead, we weigh the facts of each case." *Family Fed'n*, 129 A.3d at 243; *cf. Shoppers Food*, 746 A.2d at 329 ("[T]here are no . . . 'talismanic formulas' for the determination of personal jurisdiction under § 13–423(a)(1) and (b) . . . ."). Then, in upholding jurisdiction, the court again spoke only in terms of the Due Process Clause. *Family Fed'n*, 129 A.3d at 243–44 ("[T]hese directors clearly could anticipate being hauled into [a District of Columbia] court to account for their activities and . . . doing so does not violate notions of fair play and substantial justice.") (second alteration in the original); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980); *International Shoe*, 326 U.S. at 316.

Likewise, in *Daley*, the court engaged in the traditional due process analysis while upholding jurisdiction over non-resident members of a non-profit (who were its

officers and directors). *Daley*, 26 A.3d at 727–28. In so doing, the court rebuffed the "so-called corporate or fiduciary shield doctrine" as "inapplicable":

> In the very case relied upon by appellees, we said that "we explicitly decline to adopt such an absolute 'fiduciary shield' doctrine, which would be difficult to reconcile with Supreme Court precedent and with persuasive case authority from other courts." *Flocco,* 752 A.2d at 163 n. 20. *See, e.g., Calder,* 465 U.S. at 790 (defendants' "status as employees does not somehow insulate them from jurisdiction").

Daley, 26 A.3d at 728 n.3 (citations shortened).

Flocco concerned a "double derivative action," *Flocco*, 752 A.2d at 149 n.1, brought by an insurance policy holder against the insurance company's parent company, two individuals serving as directors and high-ranking officers at the companies, and President Bill Clinton and his attorney. *Id.* at 149. In essence, the plaintiff contended, "on information and belief," that knowing President Clinton's insurance policy did not cover a lawsuit against him, the individual corporate defendants authorized a more than $1M payout to President Clinton by the parent company. *Id.* After affirming dismissal of all claims, the court addressed jurisdiction over the individual company officers based on allegations (denied by affidavits) that they sent agents to meet with President Clinton's attorney in D.C. and ordered the company's payout to President Clinton and the attorney, who were in D.C. *Id.* at 156–57, 161.

Like in *Daley* and *Family Federation*, the *Flocco* court analyzed jurisdiction as turning on the Due Process Clause. *Id.* at 162 (reaffirming holding that relevant long-arm provision "extends as far as the Fifth Amendment's Due Process Clause permits" and quoting *World-Wide Volkswagen* and *Asahi Metal Indus. Co. v. Superior Court of*

Cal., 480 U.S. 102 (1987), to frame its minimum-contacts analysis). Ultimately, the court concluded that, even crediting the allegations, the defendants could not "reasonably have anticipated being haled into court in the District, as individual defendants, to answer a suit such as [plaintiff's]." *Flocco*, 752 A.2d at 164. Appraising their contacts with D.C. as attenuated, the court feared "nonresident officers of multi-national corporations located in jurisdictions many thousands of miles from the United States [could otherwise be haled into the District's courts] whenever a plaintiff has made conclusory allegations, on information and belief, that such persons have directed or supervised activities of subordinates who have taken some action in the District." *Id.*

In denying jurisdiction over these defendants, it is true that the D.C. Court of Appeals cited "agree[ment] with the analysis of the courts in *Wiggins* and *Richard* [*v. Bell Atlantic Corp.*, 976 F. Supp. 40 (D.D.C.1997)]," which at least flirt with some version of the fiduciary shield under federal due process. *Flocco*, 752 A.2d at 163. Still, it remains unclear exactly what the court understood that concept to entail. *Cf. Family Fed'n*, 129 A.3d at 243 (defining fiduciary shield as equivalent in terms to the no-imputed-contacts rule). In light of *Family Federation*, the *Flocco* court likely viewed the employees' contacts with D.C. in *Flocco*, *Wiggins*, and *Richards* as conclusory and so attenuated that jurisdiction over them would impermissibly resemble jurisdiction "automatically follow[ing] from jurisdiction over the corporation which employ[ed them,]" *Keeton*, 465 U.S. at 781 n.13, thereby violating due process's no-imputed-contacts rule.

In any event, the court only recognized the district court's analysis as "under the Due Process Clause." *Flocco*, 752 A.2d at 162; *id.* at 163, 163 n.20 (relying on the [*Wiggins*] "judge's . . . invocation of a 'due process' analysis"). Indeed, with reference to due process, the court still took pains to "explicitly decline to adopt . . . an absolute 'fiduciary shield' doctrine, which would be difficult to reconcile with Supreme Court precedent and with persuasive case authority from other courts." *Id.* at 163 n.20. At no point did the court purport to adopt the doctrine as a matter of local District law. *Cf. Newsome*, 722 F.3d at 1276. Indeed, had *Flocco* done so, its Footnote 20 would have been entirely unnecessary because there could be no conflict between the Supreme Court's precedents and a District-law interpretation of its long-arm statute.

Three times, the D.C. Court of Appeals has addressed the fiduciary shield, and three times declined to recognize it as a matter of District law. Instead, the court has only discussed the doctrine within the confines of the Due Process Clause and apparently now views its scope as no different from the uncontroversial, no-imputed-contacts rule. *Cf. Family Fed'n*, 129 A.3d at 243 (defining the fiduciary shield as: "[a] court does not have jurisdiction over individual officers and employees of a corporation just because the court has jurisdiction over the corporation"); *State ex rel. Miller v. Grodzinsky*, 571 N.W.2d 1, 3 (Iowa 1997), *as amended on denial of reh'g* (Dec. 11, 1997) (similarly defining the "corporate-shield doctrine" only in terms of the no-imputed-contacts rule: "a person's mere association with a corporation that causes injury in the forum state is not sufficient in itself to permit the forum to exercise jurisdiction over the agent."); *accord* § 1069.4 Application of Modern Jurisdictional

Principles—Contacts by Related Entities, 4A Fed. Prac. & Proc. Civ. § 1069.4 (4th ed.). This Court can confirm, in accordance with the Supreme Court's precedents, that the fiduciary shield enjoys no constitutional status beyond the no-imputed-contacts rule. *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1153 (6th Cir. 1990) (a state's interpretation of federal due process does not bind a federal court); *see supra*, Section I.A.1.

3. The Court should not graft a fiduciary shield onto the District's long-arm statue.

With the D.C. Court of Appeals shunning the fiduciary shield as a matter of District law, this Court should not itself "graft [the doctrine] into a long-arm statute intended to reach as far as due process allows." *Newsome*, 722 F.3d at 1278–79.[5] And especially so here. The D.C. long-arm statute's text is bereft of any fiduciary or corporate shield. *Cf. Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 470 (1988). "The principle that a matter not covered is not covered is so obvious that is seems absurd to recite it." A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (2012); *cf. Roberts v. United States*, 216 A.3d 870, 876 (D.C. 2019) ("We will

[5] The D.C. Court of Appeals has never addressed the fiduciary shield in the context of § 13-423(a)(4). While this long-arm prong occupies less than the constitutionally available space, both the Court of Appeals and this Court have interpreted it as occupying the maximal constitutional space that its plain language bears. *See Etchebarne-Bourdin v. Radice*, 982 A.2d 752, 763 (D.C. 2009) (holding that a plaintiff's claim need not arise from a defendant's activities under the prong's plus factors); *Crane v. Carr*, 814 F.2d 758, 763 (1987) (same). Given a recognized exception to the fiduciary shield for intentionally tortious activity, even in states that recognize the doctrine, *see* Section I.A.3., *infra*, it would be highly improbable for the D.C. Court of Appeals to adopt a radically draconian, "absolute fiduciary shield" under § 13-423(a)(4).

give effect to the plain meaning of a statute when the language is unambiguous and does not produce an absurd result.") (citation omitted); *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183 (2004) (A court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous."); *see also id.* at 187 n.8.

This Court may safely assume that the D.C. Court of Appeals will not reverse its course; yet even were the doctrine to be read into D.C. law, CEO Mobley's actions fall within a well-recognized exception for intentionally tortious conduct. *E.g.*, *Doe v. Thompson*, 620 So. 2d 1004, 1006 n.1 (Fla. 1993) (Florida law's fiduciary shield doctrine does not apply when the employee commits "intentional misconduct."); *see also Int'l Healthcare Exch., Inc. v. Glob. Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 358–59 (S.D.N.Y. 2007) ("[T]he state and local human rights laws, on which Plaintiff relies, provide for individual liability in discrimination cases . . . . This situation is akin to the established exception to the fiduciary shield doctrine for corporate employees who commit a tort in the forum state." (citations omitted)). Moreover, some district courts in this Circuit have already recognized a "more than an employee" exception to the fiduciary shield, which would also apply to CEO Mobley given that he wields significant influence over C&W's operations and policies and he personally made the discretionary decision to discriminatorily fire Ms. Urquhart-Bradley. *E.g.*, *Am. Action Network, Inc. v. Cater Am., LLC*, 983 F. Supp. 2d 112, 121 n.2 (D.D.C. 2013).

Additional recognized exceptions would also apply to CEO Mobley based on similar considerations. *E.g.*, *Carter v. Siemens Bus. Servs., LLC*, No. 10-cv-1000, 2010

WL 3522949, at *6–7 (N.D. Ill. Sept. 2, 2010) (an employee's discretion in committing discrimination weighs against granting Illinois law's fiduciary shield); *C.S.B. Commodities, Inc. v. Urban Trend (HK) Ltd.*, 626 F. Supp. 2d 837, 847 (N.D. Ill. 2009) (an employee's direct financial stake in the corporation's health weighs against granting Illinois law's fiduciary shield). Without an atextual, shunned "shield" to insulate CEO Mobley from jurisdiction by virtue of his corporate status, the Court may freely hold him to account for his activities here. *Cf. Newsome*, 722 F.3d at 1279 (concluding that "whether or not Oklahoma would adopt the fiduciary shield doctrine as a general matter, we believe it would not apply it to the claims [plaintiff] asserts against the individual defendants"); *see* Section I.B.–C., *infra*.[6]

B. The Due Process Clause authorizes specific personal jurisdiction over CEO Mobley because he purposefully fired Ms. Urquhart-Bradley in a D.C. office that he oversees.

To exercise personal jurisdiction over a non-resident defendant, this Court tests whether the defendant's contacts with D.C. suffice under (1) the District's long-arm statute, and (2) the Fifth Amendment's Due Process Clause. *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000).[7] But when a claim against the defendant arises from their "transacting any business" in D.C., the long-arm statute simply mirrors the limits of due process. *Thompson Hine, LLP v.*

[6] Given that the fiduciary shield is neither part of federal due process, nor embraced by the District's long-arm statute, as interpreted by the D.C. Court of Appeals, the court in *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86 (D.D.C. 2008), mistakenly applied the doctrine.

[7] Ms. Urquhart-Bradley relies on Fed. R. Civ. Pro. 4(k)(1)(A) as the basis for jurisdiction over CEO Mobley. *Walden v. Fiore*, 571 U.S. 277, 283 (2014). She does not argue that general jurisdiction over CEO Mobley exists in D.C.

Taieb, 734 F.3d 1187, 1189 (D.C. Cir. 2013); *Jackson v. George*, 146 A.3d 405, 413 (D.C. 2016); D.C. Code Ann. § 13-423(a)(1) & (b). Given that the claims against CEO Mobley arise from his quite "literal," *GTE New Media Servs.*, 199 F.3d at 1347, transacting of business in D.C., the district court correctly collapsed the two-step analysis into a single Fifth Amendment question:[8] would exercising personal jurisdiction over CEO Mobley comport with the limits imposed by federal due process? *Taieb*, 734 F.3d at 1189; *Walden v. Fiore*, 571 U.S. 277, 283 (2014).

In turn, federal due process requires "minimum contacts," *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), between the defendant and the forum, "such that he should reasonably anticipate being haled into court there," *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). This entails three elements. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cty.*, 137 S. Ct. 1773, 1785 (2017) (Sotomayor, J., dissenting). **First**, the defendant must have purposely directed their activities toward the forum state, or otherwise purposely availed their self of the privilege to conduct activities there. *Id.* at 1786; *Taieb*, 734 F.3d at 1189. **Second**, the litigation must arise out of or relate to the defendant's forum-related contacts. *Bristol-Myers*, 137 S. Ct. at 1780; *Mwani v. bin Laden*, 417 F.3d 1, 12 (D.C. Cir. 2005). **Third**, even if a defendant purposefully engages in minimum contacts, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial

[8] JA40.

justice.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *International Shoe,* 326 U.S. at 320); *Bristol-Myers*, 137 S. Ct. at 1786 (Sotomayor, J., dissenting) (same); *see also Mwani*, 417 F.3d at 14.

By reaching into D.C. to terminate Ms. Urquhart-Bradley's employment there, CEO Mobley engaged in forum contacts well beyond the bare constitutional minimum. This intentional discrimination lies at the heart of the case. Accepting Ms. Urquhart-Bradley's uncontested allegations as true,[9] CEO Mobley "engaged in unabashedly malignant actions directed at [and] felt in this forum." *Mwani*, 417 F.3d at 13 (internal quotation marks omitted); *Lewis v. Fresne*, 252 F.3d 352, 358–59 (5th Cir. 2001) ("[W]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment." (citation omitted)). And not only did he reach into D.C. with his actions; by overseeing Ms. Urquhart-Bradley and the Company's office in the District, CEO Mobley purposefully availed himself of the privilege to conduct activities there—even if he did so remotely from Chicago. *Cf. MAG IAS Holdings, Inc. v. Schmückle*, 854 F.3d 894, 900–01 (6th Cir. 2017) (finding personal jurisdiction in Michigan over German CEO based on him overseeing company operations in Michigan); *Failla v. FixtureOne Corp.*, 181 Wash. 2d 642, 655 (2014), *as amended* (Nov. 25, 2014) (upholding under state long-arm statute co-extensive with federal due process a Washington court's jurisdiction over a Pennsylvania-based CEO and President for wage claims brought

[9] *See* Section III, *infra*.

by Washington employee); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 974 (5th Cir. 1984) (upholding personal jurisdiction over out-of-forum company president for wage claims); *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 453 (3d Cir. 2003) (discussing cases finding personal jurisdiction over persons who, by directing electronic activity into a forum with the manifested intent of engaging in business or other interactions there, thereby create a cause of action in a person within the forum); *accord Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 513 (D.C. Cir. 2002) (Nebraska company may be remotely "doing business in the District of Columbia" via electronic transactions). In short, CEO Mobley's suit-related conduct created a "substantial connection" with D.C. *Walden*, 571 U.S. at 284.

The Supreme Court has repeatedly "upheld the assertion of jurisdiction over defendants who have purposefully reached out beyond their [forum] and into another[.]" *Walden*, 571 U.S. at 285 (internal quotation marks and original alteration marks omitted). For example, in *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984), by circulating magazines to "deliberately exploi[t]" a market in the state forum, the out-of-state defendant subjected itself to jurisdiction there for a libel action based on the magazine's contents. *Id.* at 781. Similarly, in *Calder v. Jones*, 465 U.S. 783 (1984), the Supreme Court affirmed California's jurisdiction over a reporter and an editor in a libel suit, based on an article they had written and edited from Florida as employees for the *National Enquirer*. *See also Walden*, 571 U.S. at 287 (discussing decision). This Court has not hesitated to follow suit. *See e.g.*, *Mwani*, 417 F.3d at 13 (reversing dismissals of defendants Osama bin Laden and al Qaeda in suit brought by Kenyans

affected by defendants' terrorist attack in Kenya because it was "meant to cause pain and sow terror" in the U.S. as part of "an ongoing conspiracy").

Here, CEO Mobley created substantial contacts with D.C. that relate to his firing of Ms. Urquhart-Bradley. **First**, as CEO and a member of the Company's Global Advisory Board, Mobley deliberately assumed significant responsibilities (and undoubtably lucrative benefits) relating to the District. These include: "provid[ing] strategic vision and leadership" for the Company's D.C. office, JA25, and "leading the Americas region, including all geographic markets, service lines and businesses (including . . . Valuations & Advisory)[,]" *id.* Leadership over the D.C. market implicated overseeing more than 800 employees, $170 million in real estate transactions completed in 2017 alone, and management of over 50 million square feet of real estate. *Id.* Such responsibilities over the D.C. office were also presumably an important aspect of CEO Mobley's former role as the geographic President for the Eastern Region. JA9. And, of course, leading the Valuations & Advisory service-line required him to manage its D.C.-based head: Ms. Urquhart-Bradley. JA35.

Second, CEO Mobley indeed engaged in substantial contacts with Ms. Urquhart-Bradley leading up to his termination of her. When he rose to CEO, she became a member of his Executive Leadership team. JA10. He met with her, discussed her employment, and then engaged in ongoing negotiations over it—which she was performing out of D.C.—via email and phone calls. JA10–11. During these negotiations, he abruptly dismissed her back to D.C., after she had been summoned to join him in Chicago for Executive Leadership meetings. *Id.*

Third, through several phone calls over the course of weeks, CEO Mobley terminated Ms. Urquhart-Bradley's employment in D.C. While the district court only considered a bare "phone call alone," *see infra* Section III, this case is not about a single phone call out of the blue. At whatever point CEO Mobley resolved to fire Ms. Urquhart-Bradley and however he chose to communicate it, what matters is that his termination of her employment and "the brunt" of her resulting injury occurred in the District. *Calder*, 465 U.S. at 789; *Helmer v. Doletskaya*, 393 F.3d 201, 208 (D.C. Cir. 2004) (determining that economic injury occurs where the plaintiff "lives or works" and relying on *Calder*); *id.* at 208–09 (citing *Mareno v. Rowe*, 910 F.2d 1043, 1046 (2d Cir. 1990), which held the situses of allegedly discriminatory wrongful termination under § 1981 and Title VII and the resulting economic injury were the forum where plaintiff worked); *cf. Walden*, 571 U.S. at 288 (explaining that the connection between an alleged wrongdoer and a forum is largely a function of the nature of the wrong). D.C. is where CEO Mobley eliminated Ms. Urquhart-Bradley's livelihood, her means to provide for her family, and a defining pillar of her identity.

"In sum, [the District wa]s the focal point both of the [termination] and of the harm suffered." *Walden*, 571 U.S. at 287 (quoting *Calder*, 465 U.S. at 789). The "effects" caused by CEO Mobley's conduct, *Calder*, 465 U.S. at 789, and the "deliberate[]" termination executed by him personally, *Keeton*, 465 U.S. at 773–74, 781, connected his conduct to D.C.; and that connection, combined with the constellation of related facts tying CEO Mobley to the forum, suffice to authorize the district court's exercise of jurisdiction. *Walden*, 571 U.S. at 288; *see also, e.g.*, *Ferrigno*

v. Philips Elecs. N. Am. Corp., No. 09-cv-03085, 2010 WL 2219975, at *5 (N.D. Cal. June 1, 2010) (personal jurisdiction upheld over Netherlands-based supervisor for discriminating against a California employee); *Wright v. Xerox Corp.*, 882 F. Supp. 399, 406 (D.N.J. 1995) ("Racially biased decisions taken at a foreign corporate headquarters may wreak injustice on [a forum's] citizens and thwart the cardinal policy of their legislature. Non-resident corporate officials can foresee being made to answer [in the forum's courts] for such a wrong, and requiring them to do so is not constitutionally unreasonable.").

Moreover, the Supreme Court has also upheld jurisdiction over defendants who reach out into foreign fora through their contractual relations, to "create continuing relationships and obligations" there. *Burger King*, 471 U.S. at 473; *see also, e.g.*, *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum]."). This Court has held likewise. *Helmer v. Doletskaya*, 393 F.3d 201, 206 (D.C. Cir. 2004). In *Helmer*, a D.C. resident sued his Russian ex-girlfriend for breach of contract, *inter alia*, when she refused to repay him for charges to his credit card that she incurred while living in Moscow. *Id.* at 203. The Court held there was jurisdiction over the claim because the parties formed the contract for repayment in D.C. and the defendant knew the billing statements would be sent to plaintiff's residence in D.C.; so their contract contemplated "repeated contacts with the District . . . as a condition of performance." *Id.* at 203, 205–06.

Much like the "experienced and sophisticated businessmen" in *Burger King*, CEO Mobley "eschew[ed] the option" of other employment opportunities and voluntarily accepted his position as CEO of the Americas for a multi-national corporation "and the manifold benefits that would derive from affiliation with [such an] organization." *Burger King*, 471 U.S. at 479–80, 484. His performance in the position envisioned "substantial and continuing" contacts with both the Company's D.C. office and Ms. Urquhart-Bradley as a member of his Executive Leadership there. *Id.* at 487; *cf. Helmer*, 393 F.3d at 203, 205–06. While such contacts diverge in some respects from the franchisee-franchisor ties between the *Burger King* defendant and Florida, the "quality and nature" of CEO Mobley's contacts with D.C. "can in no sense be viewed as random, fortuitous, or attenuated." *Burger King*, 471 U.S. at 480 (internal quotation marks omitted). His exercise of corporate authority by discriminatorily firing Ms. Urquhart-Bradley, caused her glaringly foreseeable injuries in the District; it is "at the very least, presumptively reasonable for [CEO Mobley] to be called to account there for such injuries." *Burger King*, 471 U.S. at 480; *see also Mwani*, 417 F.3d at 13 (defendants had "fair warning" jurisdiction would be proper based on their purposeful direction of action in the forum).

Indeed, CEO Mobley lacks the "compelling case" required to "render jurisdiction unreasonable" under the circumstances. *Mwani*, 417 F.3d at 14 (citing

Burger King, 471 U.S. at 477).[10] "Such cases are rare." *Newsome v. Gallacher*, 722 F.3d 1257, 1271 (10th Cir. 2013). "The factors relevant to such an analysis include:

- 'the burden on the defendant,
- the forum State's interest in adjudicating the dispute,
- the plaintiff's interest in obtaining convenient and effective relief,
- the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
- the shared interest of the several States in furthering fundamental substantive social policies.'"

Bristol-Myers, 137 S. Ct. at 1786 (Sotomayor, J., dissenting) (quoting *Burger King*, 471 U.S. at 477 (internal quotation marks omitted in original)). If anything, these reasonableness factors only weigh towards "lesse[ning] the showing of minimum contacts tha[t] would otherwise be required." *Burger King*, 471 U.S. at 477.

To start, D.C. asserts a strong interest in protecting employees from discrimination within its borders. *Monteilh v. AFSCME, AFL-CIO*, 982 A.2d 301, 304 (D.C. 2009) ("The [D.C. Human Rights Act] was passed to underscore the Council's intent that the elimination of discrimination within the District of Columbia should have the highest priority[.]" (internal quotation marks omitted)); *see also Keeton*, 465 U.S. at 776 ("[I]t is beyond dispute that [a forum] has a significant interest in

[10] As the foregoing analysis evinces, this litigation unquestionably arises out of or relates to CEO Mobley's forum-related contacts. *See Bristol-Myers*, 137 S. Ct. at 1780; *Mwani*, 417 F.3d at 12.

redressing injuries that actually occur within [it].").[11] Preserving Plaintiff Urquhart-Bradly's choice of venue also safeguards her "interest in obtaining convenient and effective relief." *Int'l Healthcare Exch., Inc. v. Glob. Healthcare Exch., LLC*, 470 F. Supp. 2d 345, 360 (S.D.N.Y. 2007). Here, Congress's interest magnifies this concern, because Plaintiff "assumed the role of 'a private attorney general' [to] fill[] an enforcement void in the State's own legal system, a function 'that Congress considered of the highest priority[.]'" *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 566 (2010) (quoting *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (*per curiam*)). The same holds true for D.C.'s interest as expressed through the DCHRA, which like § 1981 (and 42 U.S.C.A. § 1988), depends upon deputized private attorneys general for its enforcement. D.C. Code § 2-1403.16. Scattering Ms. Urquhart-Bradley and other private attorneys general far and wide, would pile on costly inefficiencies for plaintiffs and the interstate judicial system. Here, it would necessitate duplicative and sprawling proceedings in Illinois, the District, and beyond. Such a practice would undermine the vindication of civil rights and enforcement of the Nation's and the District's policies against discrimination writ large.[12]

Conversely, any burden on CEO Mobley is "mitigated by the inevitability of [his] appearance as [a key] witness[] in a trial against" the Company in D.C. *Int'l*

[11] *See also* D.C. Code § 2-1401.01; *id.* § 2-1402.01.

[12] *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986); *see also* 775 Ill. Comp. Stat. Ann. 5/1-102; Ill. Const. art. I, § 17.

Healthcare, 470 F. Supp. 2d at 360. And "the conveniences of modern communication and transportation ease any burden the defense of this case" in D.C. may impose on him as an Illinois resident. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013); *accord Burger King*, 471 U.S. at 474. His legal representation by the same counsel as Cushman & Wakefield also diminishes any residual burden. CEO Mobley "presumably decided that the advantages of affiliating with a [multi-]national organization provided sufficient commercial benefits to offset [such] detriments." *Burger King*, 471 U.S. at 485. Quite simply, CEO Mobley cannot show that litigating in D.C. "is onerous in a special, unusual, or constitutionally significant way." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 718 (1st Cir. 1996) (holding there to be nothing "special or unusual" about requiring a Hong Kong defendant to litigate in Massachusetts).

The strong federal and D.C. public policies favoring the vindication of civil rights and interstate judicial efficiency relax the minimum contacts' threshold for this case. *Burger King*, 471 U.S. at 477 (noting that "the shared interest of the several States in furthering fundamental substantive social policies," *inter alia*, may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required").

> Few policies can be characterized as more fundamental than that embodied in [anti-discrimination laws]. It serves the interests of [the District] and her sister states to require racial discrimination to be litigated in the forum where the harm is suffered. Every state has an interest in protecting its citizens from this grievous social wrong when perpetrated by the non-resident managers of large corporations.

Wright v. Xerox Corp., 882 F. Supp. 399, 410 (D.N.J. 1995); *accord Carter v. Siemens Bus. Servs., LLC*, No. 10-cv-1000, 2010 WL 3522949, at *6 (N.D. Ill. Sept. 2, 2010) (interests of federal and forum state's anti-discrimination laws justify subjecting non-resident company officials to forum's jurisdiction).

The district court referenced two decisions in concluding that it lacked specific personal jurisdiction over CEO Mobley: *Harris v. Omelon*, 985 A.2d 1103 (D.C. 2009), and *D'Onofrio v. SFX Sports Grp., Inc.*, 534 F. Supp. 2d 86 (D.D.C. 2008). JA41. Both prove inapt. Take *Omelon*; the case's D.C. plaintiff sued a Virginia doctor in D.C. Superior Court for malpractice relating to medication the doctor prescribed for him in Virginia. 985 A.2d at 1103–04. The doctor's lone contact with D.C. had been calling in the prescription to a pharmacy near the patient's home "at the request of and for the convenience of the [plaintiff]." *Id.* at 1103–04, 1106. The court dismissed the case for lack of personal jurisdiction and the D.C. Court of Appeals affirmed, finding "no indication that [the doctor] availed himself of the benefits of the District in any meaningful way." *Id.* at 1106. The Court of Appeals underscored that "courts generally decline to assert personal jurisdiction over physicians where the doctor-patient contact is established unilaterally by the patient," *id.* at 1106 n.2, so it would be anomalous to "find[] jurisdiction based solely on the patient's choices and actions." *Id.* at 1106.

This hardly precludes jurisdiction over CEO Mobley. *Omelon* stands for a "[w]ell-established principle[] of personal jurisdiction," that "it is the defendant, not the plaintiff or third parties, who must create contacts with the forum . . . ." *Walden*,

571 U.S. at 291. The *Omelon* plaintiff rested his jurisdictional case on "precisely the sort of unilateral activity of a third party that cannot satisfy the requirement of contact with the forum State." *Walden*, 571 U.S. at 291 (internal quotation marks omitted). In contrast, this case does not hinge on any unilateral activities by Ms. Urquhart-Bradley. CEO Mobley did not accept his employment and its myriad D.C.-related contacts for her health or convenience. They both freely chose to work for C&W and accepted the consequences: a tango of interactions tying them to the District.

The Constitution also betrays no loophole for business conducted remotely via telephone calls or emails. "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." *Burger King*, 471 U.S. at 476 ("So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there."); *Lewis v. Fresne*, 252 F.3d 352, 358–59 (5th Cir. 2001). Nor is "'[c]yberspace,' . . . some mystical incantation capable of warding off the jurisdiction of courts built from bricks and mortar." *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510 (D.C. Cir. 2002). Just as "transactions by mail and telephone [can] be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum[, t]here is no logical reason why the same should not be true of transactions accomplished through the use of e-mail . . . ." *Id.* at 511; *accord*

Schmückle, 854 F.3d at 901; *Failla*, 181 Wash. 2d at 655–56; *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 453 (3d Cir. 2003).

D'Onofrio also fails to upend the case for jurisdiction here. There, the plaintiff sued a company and two of its Texas-based employees for, *inter alia*, discriminatorily terminating her job in D.C. A district court in this Circuit dismissed the individual defendants for lack of personal jurisdiction—even though they admitted to participating in the termination decision—because their actions were "within [their] scope of employment." *D'Onofrio*, 534 F. Supp. 2d at 92. While *D'Onofrio*'s facts bear a striking resemblance to this case, its holding is at odds with U.S. Supreme Court and D.C. Court of Appeals precedents, as well as many decisions of the U.S. Courts of Appeals and other states' highest courts. As explained in Section I.A., *supra*, the Court should decline to follow *D'Onofrio*.

C. The D.C. long-arm statute authorizes specific personal jurisdiction over CEO Mobley because he both transacted business and caused tortious injury in D.C. by purposefully firing Ms. Urquhart-Bradley in a D.C. office he oversees.

1. Ms. Urquhart-Bradley's claims against CEO Mobley arise from his "transacting any business" in D.C.

[Omitted]

2. Ms. Urquhart-Bradley's claims against CEO Mobley arise from his "causing tortious injury" in D.C.

[Omitted]

II. The district court misapplied Federal Rule of Civil Procedure 12(b)(2) by failing to fully credit Ms. Urquhart-Bradley's uncontroverted factual proffer.

[Omitted]

III. Any factual insufficiency requires remand to fully develop the extent of CEO Mobley's contacts with the District.

[Omitted]

Applicant Details

First Name	**CHRISTOPHER**
Last Name	**WEEKS**
Citizenship Status	**U. S. Citizen**
Email Address	**CMW121093@GMAIL.COM**
Address	**Address** **Street** **1014 W Street NW** **City** **Washington** **State/Territory** **District of Columbia** **Zip** **20001**
Contact Phone Number	**6038323675**

Applicant Education

BA/BS From	**Occidental College**
Date of BA/BS	**May 2016**
JD/LLB From	**American University, Washington College of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=50901&yr=2010**
Date of JD/LLB	**May 23, 2021**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**American University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Carter, Adam
ACarter@employmentlawgroup.com
202-425-4269
Durrer, Dale
dale.durrer@gmail.com
5407185527

References

The Honorable Dale Durrer, dale.durrer@gmail.com 540-718-5527

Janel Quinn, Jquinn@employmentlawgroup.com 202-261-2813

Adam Carter,
ACarter@employmentlawgroup.com 202-425-4269

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Christopher M. Weeks
1014 W Street NW
Washington D.C. 20001

August 22, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to express my interest in a clerkship with your chambers following my graduation in May 2021. I am currently a third-year law student studying at American University Washington College of Law. As a part-time evening student, I have been able to complement my studies with valuable real-world experience as a Litigation Law Clerk at a plaintiff-side litigation firm, The Employment Law Group. Having worked on over 40 complex cases, touching on a diverse range of legal issues, I have developed an appreciation for the unparalleled learning opportunities in the legal profession. Serving as a federal judicial law clerk is a natural next step for me to continue to refine my legal research and writing, while contributing to the important work done by your chambers.

Drafting filings across 17 federal district courts as a Litigation Law Clerk has allowed me to develop the flexibility to quickly adapt to local nuances in procedural court rules. To ensure my work adheres to a court's local rules, I download the court's local rules and identify sample filings as early as possible when a new case is assigned to me. Before starting a clerkship with your chambers, I will dive in and develop a concrete understanding of your court's local rules to ensure I am prepared to contribute to your work on day one.

The range of federal courts I interact with is matched by the variety of legal issues I research as a Litigation Law Clerk, and as a contributing editor on the American University Law Review (AULR). Utilizing the research and writing skills I have developed over the past three years, I recently coauthored an article that discussed the First Amendment and compelled speech, which was selected for publication in AULR this fall. My excitement and hunger for knowledge is something that will inspire me to deliver the best work product possible, from my first day to my last day with your chambers.

My work experience has underscored the value of not only a diligent judicial law clerk, but also a kind one. Whenever I call a clerk's office in my role at The Employment Law Group, I always appreciate when I interact with a friendly and helpful individual on the other end of the line. I have always sought to be an amicable colleague in the variety of legal roles I have worked in over the past three years. This was recently recognized when I was selected to supervise a team of summer interns at The Employment Law Group. I will always strive to be an approachable clerk, both to my colleagues and those calling your chambers with inquiries.

Developing my legal research and writing skills has required a diligent work ethic, but I remain appreciative for all I have learned over the past three years. The work ethic I have dedicated to my responsibilities through my law school and professional career is the same work ethic I intend to bring as a clerk in your chambers.

Thank you for your consideration, and I hope to hear from you.

Sincerely,
Christopher M. Weeks

CHRISTOPHER M. WEEKS

1014 W Street NW, Washington DC, 20001 ◦ CMW121093@gmail.com ◦ (603) 832-3675

EDUCATION:

- **American University**, Washington D.C., Juris Doctorate (Evening Division) — Anticipated May 2021
  - GPA and Honors: 3.80 (Top 10%); Dean's List Scholarship Recipient
- **Occidental College**, Los Angeles, CA, Bachelor of Arts, Diplomacy and World Affairs — May 2016
  - GPA and Honors: 3.48; Dean's List
- **Qasid Language Institute**, Amman, Jordan, Modern Standard Arabic Certificate — Sept. 2014

RELEVANT PROFESSIONAL EXPERIENCE:

- **Senior Litigation Law Clerk**, The Employment Law Group, PC, Washington, D.C. — Sept. 2018 – Current
  - As the primary law clerk on the majority of the firm's *qui tam* practice, I have developed a strong knowledge of caselaw related to federal and state whistleblower protection statutes.
  - Responsible for billing a total of 120 hours per month through working alongside Litigation Associates and Principals on all phases of litigation.
  - Conduct and analyze legal research on a wide range and high volume of legal issues to draft complaints, motions, and other filings for administrative agencies, state courts, and federal courts.
  - Ensure an active litigation posture on approximately forty complex cases by coordinating regularly with clients, federal judicial law clerks, and Assistant United States Attorneys.

- **Legal and Business Affairs Associate**, EAB Global, Inc., Washington, D.C. — Nov. 2017 – June 2018
  - Analyzed and processed legal inquiries for a five-person team of attorneys and developed a new tracking system for inbound legal requests, increasing efficiency in the legal affairs department.
  - Drafted employment contracts, non-disclosure agreements, and non-solicitation agreements.
  - Evaluated approximately two dozen contracts and letters of agreement daily to ensure compliance with company policies and presented findings in a monthly presentation for the Associate General Counsel.

RELEVANT LAW SCHOOL EXPERIENCE:

- **Note and Comment Editor**, American University Law Review, Washington, D.C. — April 2018 – May 2020
  - Co-authored the following Note for publication: Gregory Taylor and Christopher Weeks, Note, Compelled Identity: EEOC Policy to Reclassify Identity as a Free Speech Violation, 70 Am. U.L. Rev. F. (forthcoming 2020).
  - Acted as the primary editor for six student comments considered for publication.
  - Managed initial edits and source collection for four published articles.
  - Engaged in the interview and selection process for the Volume 70 Editorial Board and served on a committee responsible for overseeing amendments to the Law Review's policy manual.

- **Supreme Court Justice**, WCL Student Bar Association, Washington, D.C. — April 2018 – Current
  - Served as one of five justices overseeing all cases and controversies arising from WCL's Student Bar Association Constitution and legislation drafted by the Student Bar Association Senate.

VOLUNTEER EXPERIENCE

- **ESL Teacher**, Washington English Center — Jan. 2020 – Current
- **Class Secretary**, Occidental College Class of 2016 — Aug. 2017 – Current
- **Washington DC Regional Committee Member**, Occidental College — Oct. 2016 – Current

ADDITIONAL EXPERIENCE

- **Attaché**, Permanent Mission of Rwanda to the United Nations, New York, N.Y. — Sept. 2015 – Dec. 2015
- **Intern**, Department of Homeland Security, Washington, D.C. — June 2015 – Aug. 2015
- **President**, Occidental College Student Government, Los Angeles, CA — May 2014 – May 2015

SKILLS

- **Language**: Elementary Modern Standard Arabic and Amiya Arabic proficiency.
- **Citation**: Expert with Bluebook, Chicago, and MLA formatting.
- **Software**: Expert with LexisNexis and Westlaw as well as legal billing and document review software.

CHRISTOPHER WEEKS
American University, Washington College of Law
Cumulative GPA: 3.81 as of August 2020

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Professor Andrew Pike	A-	4	
Legal Rhetoric	The Honorable Dale Durrer	B+	2	
Torts	Professor Andrew Popper	A-	4	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Procedure	Professor Bernie Corr	A	4	
Criminal Law	Professor Cynthia Jones	A-	3	
Research and Writing	The Honorable Dale Durrer	A	2	

Summer 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Human Rights:Current Challenges	Professor Claudio Grossman, Professor Diego Rodriguez-Pinzon	A-	2	
International Organizations and Multi-National Institutions	Professor Nneoma Veronica Nwogu	A	1	
International Trade Agreements & Worker's Rights	Professor Desiree Ganz	A-	1	
The International Labor Organization: Decent Work Agenda	Professor Macarena Saez	A	2	

Summer abroad program in Geneva, Switzerland.

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law	Professor Stephen Wermiel	A	4	
Criminal Procedure	Professor Dennis Clark	A	3	
Religion and the State	Professor Patricia Maskew	A-	2	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

American University Law Review I		CR	2
Evidence	Professor Kenneth Troccoli	A	4
Property	Professor Bill Snape	A	4

Summer 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Legal Ethics	Professor Emma Leheny	A-	2	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American University Law Review		CR	2	
Challenges and Obligations of the Prosecutor	The Honorable Carlos Acosta, Professor Brittany Keil	A-	2	
Law, Policy, and American Intelligence	Professor James Zirkle	B+	3	
Strategic International Human Rights Litigation	Professor Macarena Saez	A-	3	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American University Law Review			2	
Constitutional Law: First Amendment	Professor Stephen Wermiel	Pass	3	
Jurisprudence of Justice Breyer	Professor Brent Newton	Pass	1	
Wills, Trusts, and Estates	Professor Jane Moretz-Edmisten	Pass	4	

Due to the COVID-19 Pandemic, all classes for Spring 2020 are graded as "pass" or "fail". There was no option for a letter grade.

Summer 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Climate Change & the Law	Professor Bill Snape	A	2	
False Claims in Healthcare Industry	Professor Erica Kraus	A	1	

Fall 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Appellate Advocacy	Professor Thomas Bondy		3	

Civil Trial Advocacy	The Honorable Michael Algeo, The Honorable Patrick Woodward	3
Prevention of Genocide	Professor Juan Mendez	3
Professional Ethics and the Holocaust	Professor Paula Jacobs and Professor Susan Carle	1

Adam Augustine Carter
The Employment Law Group, PC
888 17th Street, NW
9th Floor
Washington, DC 20006
202-425-4269 (mobile)
acarter@employmentlawgroup.com

4 June 2020

FOR FILING ON OSCAR

Re: Christopher Weeks

Your Honor:

My name is Adam Carter and I am a Principal at The Employment Law Group in Washington, D.C. Ours is an employee-side litigation boutique with a national practice representing mostly whistleblowers and victims of discrimination and wage theft. I am a graduate of Georgetown University and the Georgetown University Law Center where I was the Editor in Chief of the *American Criminal Law Review*. I served as law clerk to the Honorable Oliver Gasch for the U.S. District Court for the District of Columbia.

I work closely with over a dozen litigation law clerks at The Employment Law Group, currently including the one I am recommending in this letter, Christopher Weeks. Chris is a strong addition to any workplace for a multitude of reasons, but the three that come most to mind are his diligent legal research, his impressive time management skills, and his consistent positive and can-do attitude, and his easy collaboration with his coworkers.

Chris primarily works on our firm's healthcare fraud actions brought under various federal and state False Claims Act statutes. However, I have worked closely with Chris on several employment cases, including a particularly complex case involving False Claims Act and National Defense Authorization Act retaliation, and Title VII sex-based discrimination, litigated hotly in the Eastern District of Virginia (the so-called Rocket Docket).

This particular case was transitioned to Chris from another law clerk right around the time we were prepared to file the complaint and Chris quickly came up to speed on the facts. When the employer's initial motion to dismiss was granted, Chris went back and built on our existing research of the legal standards and he worked closely with the client to elaborate on the facts to create a robust amended complaint. The amended complaint survived the employer's second motion to dismiss in its entirety.

Chris again exhibited tremendous legal research skills when he was tasked with researching a variety of unusual legal questions related to topics such as marital privilege, subpoenas to the plaintiff's family and friends, and potential waivers of the attorney-client privilege. This situation was not one I frequently face, and Chris was tasked with conducting a

great deal of new research before drafting our briefs. Throughout this, Chris performed excellently and was able to respond swiftly and thoroughly to each of the employer's strategic attacks on our client's claims. Chris's skill in legal research and writing was never more apparent than in this complex case and his work unquestionably benefited our client. We did not have the luxury of lots of time and so having a workable draft the first time was invaluable to me to have confidence that what I was editing could be submitted for filing in very short order.

Similarly, Chris's time management skills are evident through his work at our firm, and in his extracurricular activities. At our firm, Chris balances a load with multiple complex cases, often with competing deadlines, but he consistently produces high quality work no matter how important the case – they are all important. For instance, in our case in the Eastern District of Virginia, Chris was often drafting a variety of motions and oppositions, as well as handling the difficult job of reviewing and producing a veritable trove of electronic documents in discovery at the same time. This was particularly demanding given the Rocket Docket's unforgiving deadlines, but Chris balanced his workload, communicated when he needed assistance, asked good questions, and delivered high quality work in a timely manner and always like a true professional.

Chris does all this while balancing multiple classes in the evening, serving as an editor on the *American University Law Review*, teaching English as a second language courses on the weekends, and volunteering for his alma mater. Chris's ability to balance all these important priorities truly puts Chris in the very highest percentile of professionals I have supervised or worked with since 1992 when I began in private practice.

In addition to Chris's prowess for legal research, he has been a most enjoyable colleague to work with, both for me and his fellow law clerks. I can recall multiple occasions where Chris has stepped in as a teammate for his colleagues while they have been out on leave in order to ensure my cases have continued to move smoothly and productively for our clients. He has been quick to step in when colleagues have questions and uses his experience at our firm to strengthen the work products of all those around him. This has not gone unnoticed and was a factor considered when he was recently offered a promotion to a senior law clerk position; in this position Chris now trains and mentors new law clerks to ensure his strengths are imparted to our entire team and his colleagues. He is fun, personable, and easy going.

Considering Chris's diligent legal research, time management, and amiable personality, I am fully supportive of his endeavor to earn a federal judicial clerkship. Run, don't walk. This is a top-notch candidate by any measure. Should you have any questions, I can be reached by phone or text on 202-425-4269 or use acarter@employmentlawgroup.com for email.

With many thanks for your kind consideration, I am

Yours very truly,

/s/ Adam Augustine Carter

Adam Augustine Carter

May 12, 2020

Re: Christopher Weeks

To whom it may concern:

I write in support of Christopher Week's application for a judicial clerkship. I am a Circuit Court Judge in the Commonwealth of Virginia and have served on the adjunct faculty at American University's Washington College of Law since 2006.

Chris was a student in my Legal Rhetoric Class during the 2017-2018 academic year. Legal Rhetoric is a mandated first year course that teaches writing, research, citation and advocacy skills. It is a small class consisting of approximately twelve students.

I have had the opportunity to work closely with Chris and critique his writing, research, advocacy and analytical skills. During the fall semester, the students write several objective legal office memoranda applying the law of a jurisdiction to the facts of a case. Chris received excellent grades in the fall and spring semesters.

I am impressed with his intellectual curiosity. He did an excellent job on all writing assignments of providing an objective analysis of the facts to the law while drawing reasonable inferences. He also participated in class with thoughtful insights on solving client problems. Chris is one of the few students who consistently contacted me outside of class and he asked thoughtful and insightful questions on class issues.

During the spring semester, the students had to present a five (5) minute argument in support of or in opposition to a 12(b)(6) motion under the Federal Rules of Civil Procedure. Chris was among the top 5% of the class on this assignment because he argued his case in a conversational tone without reading from any prepared text. He did a good job of thinking on his feet and responding to tough questions.

Chris also wrote an appellate brief with a partner during the spring semester concerning complicated issues involving the 4th and 5th amendments. He presented a fifteen-minute appellate argument and did an excellent job of responding to tough questions from a panel of judges. His argument was among the best among the students in the class. Chris has a trained ability to organize, triage and prioritize tasks successfully. I recommend him highly to you.

I see these skills in his ability to have a successful full-time career while attending law school part-time. He is very capable, but what sets him apart from other applicants is his work ethic and determination. I am proud that I had the opportunity to teach him.

I have been a judge for seven years. Regrettably, I do not have funding for a full-time law clerk. If I had the funding, I would not hesitate to hire Chris. His research and writing skills are among

the best I've seen. He also possesses the necessary interpersonal skills to work effectively with others.

If you have any questions or comments, please do not hesitate to contact me at 540-718-5527 or ddurrer@vacourts.gov.

Sincerely,

Dale Durrer

Judge, 16th Judicial Circuit

Orange & Madison County

P.O. Box 230

Orange VA 22960

Your Honor:

As a Litigation Law Clerk at The Employment Law Group, I served as the primary researcher, drafter, and editor of the following memorandum in opposition to a defendant's motion to dismiss. This was filed in the Eastern District of Virginia in August 2019. Adam Carter, a Principal at The Employment Law Group, reviewed and approved the filing of this memorandum with minimal edits. After consulting with Adam Carter, he agreed this was an appropriate legal writing sample for my clerkship application.

Portions of this writing sample have been removed to comply with the requested page count limit. A full version of this writing sample can be made available upon request.

Regards,

Christopher M. Weeks

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

SERI IRAZOLA,

Plaintiff,

v.

FORS MARSH GROUP,

Defendant.

Case No.: 1:19-cv-554-LO-MSN

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff Seri Irazola ("Irazola") hereby submits this memorandum of points and authorities in opposition to the motion to dismiss filed by Defendant Fors Marsh Group ("FMG"). Irazola pleads sufficient facts in her Amended Complaint to state a claim with respect to each of the counts she alleges. FMG's motion should be denied in its entirety.

Standard of Review

In the interest of brevity, Irazola incorporates here her Statement of Facts from Irazola's original Complaint. *See* Compl. ¶¶ 1-7 (ECF No. 1-1). Additionally, Irazola incorporates the Standard of Review and pleading requirements from Irazola's Opposition to Defendant's first Motion to Dismiss. *See* Opp. at 7-8 (ECF No. 9). Irazola disagrees with FMG's assertion that the modifications to Irazola's Amended Complaint are "negligible and inconsequential." Second Mem. Opp. at 2 (ECF No. 16).

Irazola will briefly highlight the key amendments she has made in her Amended Complaint. *See generally* Am. Compl. (ECF No. 12). Throughout Irazola's Amended Complaint, Irazola provided additional background information on what is permissible and what

is impermissible with government contracting. *Id.* ¶¶ 8-12. For instance, questions about how to manipulate a contract for incumbents to win are not permitted and while general questions are allowed, the questions and answers by the agencies will typically be published on websites to insure transparency. *Id.* ¶¶ 8-10. Contrary to these rules, Irazola sought to highlight that FMG was working with the David Beirne ("Beirne"), Director of FVAP, and Matt Boehmer ("Boehmer"), Director of OPA, to guarantee FMG would win recompetes and to ensure the amount of money in the contracts would be maximized. *Id.* ¶ 12. Irazola's knowledge of these rules and regulations comes from her education by the Office of Special Counsel ("OSC") and the Office of Inspector General ("OIG") at the Department of Justice. *Id.* ¶ 34. All three FMG owners had personal relationships with the Director of OPA, Boehmer, and through these relationships, Boehmer promised to "throw business" to FMG. *Id.* ¶ 45. Less than a week after reporting her concerns to Fahima Vakalia ("Vakalia"), who reports to one of the three owners of FMG, Ben Garthwaite ("Garthwaite"), Irazola was terminated; and another individual, Mary Beth Lombardo ("Lombardo"), who shared the information that Irazola believed the communications between FMG and the DoD were illegal, was also terminated. *Id.* ¶ 60.

The amendments offered by Irazola supplement and address the deficiencies identified in this Court's Memorandum Opinion dated June 28, 2019. *See* Order (ECF No. 11). Further, the Statement of Facts from Irazola's Amended Complaint provides this Court all the necessary facts, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007). While "[i]t is not necessary to state specific facts to survive a motion to dismiss" Irazola has sought to provide specific facts when possible which will be further specified and revealed in discovery. *See E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 637 F.3d 435 (4th Cir. 1992).

ARGUMENT

I. Irazola Has Sufficiently Pled a Title VII Discrimination Claim.

Irazola has pled sufficient facts to state a plausible claim of discrimination under Title VII. As stated in this Court's Order, dated June 28, 2019, Title VII discrimination claims require: "(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class." *Robinson v. Loudon Cty. Pub. Sch.*, 2017 WL 3599639, at *3 (E.D. Va. Aug. 18, 2017). The first element, that Irazola is a member of a protected class, is not disputed. Beyond this, Irazola has alleged facts to establish a case of discriminatory termination under Title VII to meet the required burden at the motion to dismiss phase.

A. Irazola's New Executive Leadership Team Allegations Satisfy her Burden of Pleading Satisfactory Performance.

In addition to the facts already present which support Irazola's claim of satisfactory job performance, Irazola's added numerous facts to Irazola's Amended Complaint related to Irazola's inclusion in an Executive Leadership Team. Irazola's inclusion in the Executive Leadership Team, in addition to the lack of negative performance reviews and other indicators of a positive job performance, confirm that the amended complaint presents, as required by *Twombly*, "'enough fact to raise a reasonable expectation that discovery will reveal evidence' of the alleged activity [in this case Title VII Discrimination]." *United States Airline Pilots Ass'n v. Awappa*, LLC, 615 F.3d 312, 317 (4th Cir. 2010) (quoting *Twombly*, 550 U.S. at 556). FMG does note that it is the "'perception of the decision maker which is relevant,' and the employee's own perception of her performance is irrelevant." *Conyers v. Va. Hous. Dev. Auth.*, 927 F. Supp. 2d 285, 292 (E.D. Va. 2013) (quoting *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980)), aff'd, 533 F. App'x 342 (4th Cir. 2013). But Irazola's original complaint, supplemented by Irazola's

Amended Complaint establish just that: FMG did have a positive perception of Irazola's job performance. In February 2018, FMG promoted Irazola to a VP position and FMG has not described any written notice of deficiencies with respect to her performance or communication style. Am. Compl. ¶ 69 (ECF No. 12). Later, in March 2018, Irazola was again selected by FMG to participate in an Executive Leadership Team. *Id.* ¶ 70. This team was described as having "a wealth of varied backgrounds and experiences, as well as a shared vision for the success of [FMG]," an endorsement that would be unlikely to be given to someone who was showing poor performance. *Id.* ¶ 70. Further, of all the employees at FMG, Irazola was only one of four (4) that were selected to be a member of this team. *Id.* ¶ 71.

While it is accurate that "conclusory statements … alone, would not raise [a] Plaintiff's claim to relief beyond the speculative level", Irazola, like the plaintiff in *Kikwebati,* has shown that at "the time of [her] dismissal, [s]he was performing [her] job in a way that met the legitimate expectations of the Defendant." *Kikwebati v. Strayer Univ. Corp.,* 2014 WL 7692396 at *7 (E.D. Va. 2014). Irazola adamantly believes Irazola was performing Irazola's job in a way that satisfied the expectations of FMG and, beyond this, that FMG also acknowledged Irazola's exceptional performance. Am. Compl. ¶¶ 69-71 (ECF No. 12). For instance, in *Kikwebati*¸ a plaintiff offered "conclusory statements" but also offered additional support to bolster the plaintiff's own perception of positive performance to strengthen the claim of a Title VII violation to survive a Motion to Dismiss. *Id.* at *7-*8. The plaintiff in *Kikwebati* received "'commendable' audits;" a scenario analogous to the "wealth of varied backgrounds and experiences" phrasing used when referring to the exclusive Executive Leadership Team Irazola was asked to join. *Id.* at *8; Am. Compl. ¶¶ 70-71 (ECF No. 12). Further, in *Kikwebati* the plaintiff managed a highly ranked campus and "it is reasonable to infer that [the] Plaintiffs'

campus would not be highly ranked if Plaintiff… was not satisfactorily performing his job functions;" a scenario analogous to Irazola acquiring new business and success supporting the acquisition of a contract valued at $8 million. *See Kikwebati*, 2014 WL 7692396 at *8; Am. Compl. ¶ 32 (ECF No. 12). Finally, FMG has a progressive discipline policy to address poor employee performance. *Id.* ¶¶ 72-73. Had Irazola been performing poorly, this policy would have allowed Irazola to recognize any unsatisfactory performance that her FMG manager perceived, but FMG *never* provided any written notice of any deficiencies in Irazola's performance. *Id.* This means that either Irazola did not have performance issues, or FMG violates its own policies and rules. FMG had months to prepare and notify Irazola of her alleged negative performance, as is outlined in FMG's policies. Still, instead of providing a negative performance review, FMG spent the weeks before Irazola's termination promoting Irazola to an Executive Leadership Team and promoting her to a Vice President position. *Id.* ¶¶ 69-73.

B. Irazola's New Allegations About Other Male Employees Have Alleged That FMG Treated her Differently From Similarly Situated Employees Outside her Protected Class.

1. *These New Allegations Are Within The Scope of Claims Irazola Administratively Exhausted.*

FMG argues that Irazola failed to exhaust administrative remedies for Irazola's Title VII Discrimination Claim. This is not accurate. Irazola informed the EEOC about male employees who were treated more favorably than Irazola. *See* Second Mem. Opp. Ex. 1 (ECF No. 16-1). The fact that Irazola did not provide a full summary of every possible comparator who Irazola recalled at the time of filing Irazola's Charges of Discrimination does not exclude these claims. So long as "a plaintiff's claims in her judicial complaint are reasonably related to her EEOC charge and can be expected to follow from a reasonable administrative investigation," she "may advance such claims in her subsequent civil suit." *Smith v. First Union Nat'l Bank*, 202 F.3d

234, 247 (4th Cir. 2000). *See also Sydnor v. Fairfax Cty., Va.*, 681 F.3d 591, 594 (4th Cir. 2012); *Chisolm v. United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981) ("An administrative charge of discrimination does not strictly limit a Title VII suit which may follow; rather, the scope of the civil action is confined only by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination."). As the Supreme Court has made clear, "[d]ocuments filed by an employee with the EEOC should be construed, to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies." *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 406 (2008). Hence Irazola properly exhausted her Title VII Discrimination claims as it is reasonably likely other male comparators would have been included in an administrative investigation following Irazola's charge of discrimination.

2. *Hall and Irazola Are Similarly Situated.*

Throughout FMG's Motion to Dismiss at bar, FMG ignores many of the factors which show the three male co-workers Irazola described were valid comparators. Irazola has shown that Irazola was satisfactorily performing Irazola's job duties at the time of Irazola's termination and has adequately pled that similarly situated male employees received more favorable treatment for far worse behavior than the alleged reason FMG cited for Irazola's termination – that she did not "fit" with company "values." *See* Am. Compl. ¶¶ 69-72, 75-100 (ECF No. 12).

Thad Hall ("Hall") served at the director of Public Policy Evaluation. *Id.* ¶ 79. Irazola brought numerous concerns, to Irazola's and Hall's superior, Griepentrog, related to theft and accepting speaking fees at conferences FMG would pay for Hall to attend. *Id.* ¶¶ 82, 84. To address these concerns, Griepentrog told Irazola that Hall would receive payments for over a month to remain at FMG and Hall left FMG with his reputation intact compared to Irazola who

was forced to leave on exceptionally short notice without such a extensive opportunity to search for other jobs; Hall had thus received preferential treatment. *Id.* ¶¶ 84-89. Irazola and Hall worked on the same team and Hall worked in a similar field to Irazola. *Id.* ¶ 116.

When discussing similarly situated employees, FMG seeks to create an unreachable threshold for Irazola by targeting minute differences between her role and those of her comparators. However, "[t]here is no requirement that a similarly-situated comparator hold a plaintiff's identical position. Such a requirement would make it virtually impossible for an employee to make out a prima facie case…. The key inquiry is whether the positions are similar in the respects that are relevant to the alleged disparate treatment." *Bateman v. American Airlines, Inc.*, 614 F. Supp. 2d 660, 674-75 (E.D. Va. 2009). Many of the more specific factual questions related to job functions will be clarified in discovery, but Irazola has satisfactory pled facts to survive a motion to dismiss.

3. *Andrews and Irazola Are Similarly Situated.*

As stated in her Amended Complaint, FMG kept a male Kyle Andrews ("Andrews") employed and did not terminate Andrews without notice and only after several months of reported and documented behavior, by Andrews' subordinates, to Marsh. Am. Compl. ¶¶ 119-121 (ECF No. 12). As further evidence of the culture of FMG, Irazola learned from Von Bose that Andrews "had an anger problem" and "directed [this problem] to his female subordinates" which led to female subordinates reporting behavior to Marsh and subsequently these female subordinates left FMG. *Id.* ¶¶ 92-95. Andrews was at the same level of employment as Irazola and received approximately the same pay, a fact that can be confirmed in discovery. *Id.* ¶ 98. The treatment Andrews received was different and better than FMG's treatment of Irazola in that Irazola received no notice of her termination – the only distinction being that Irazola is female and Andrews is male.

4. *Wurtz and Irazola Are Similarly Situated.*

Finally, a male Kelly Wurtz ("Wurtz") serves as a comparator to Irazola as they both had a similar level of education and were on the same team. *Id.* ¶¶ 99, 116. Despite having had a DoD-issued laptop stolen from a strip club, FMG did not terminate or penalize Wurtz for this horrible lapse in judgment. *Id.* ¶ 100. Having such a valuable piece of technology stolen is a serious employment issue that resulted in a weaker penalization than FMG's vague "value" fit justification for Irazola's termination. *Id.* ¶¶ 68, 100, 117.

As noted in *Bateman*, it is virtually impossible to always show two employees held an identical position, but Irazola has shown a pattern of similarly situated male employees receiving preferential treatment over Irazola. *See Bateman*, 614 F. Supp. 2d at 674-75. The recurring pattern of men receiving lenience and preferential options to depart from FMG, as opposed to Irazola, who was terminated and forced to leave immediately, establishes that men have received more favorable treatment than Irazola – a female and a member of a protected class.

II. **Irazola Has Sufficiently Pled a Title VII Retaliation Claim.**

Irazola has successfully alleged that Irazola was subject to retaliation under Title VII. As stated in this Court's Order dated June 28, 2019, Title VII retaliation claims require an employee to participate in a protected activity. To constitute a protected activity a plaintiff must have been reporting employment actions that were "actually unlawful under Title VII or employment actions [Plaintiff] reasonably believe[d] to be unlawful." *Savage v. Maryland*, 896 F.3d 260, 276 (4th Cir. 2015).

This Court, noted that Plaintiff (1) "could not have reasonably believed that Dr. Griepentrog's inappropriate statements, without more, were actually unlawful under Title VII, and thus she was not participating in protected activity" and (2) had "not alleged facts that would

demonstrate the barrage of severe and pervasive harassment that is required to support a hostile work environment claim." Order at 2 (ECF No. 11). FMG ignores in its motion to dismiss the additional facts added by Irazola to cure the pleading deficiencies identified by this Court. One would expect a Motion to Dismiss of an Amended Complaint to consider and acknowledge the added factual allegations added by Irazola, but FMG instead only puts focus on the facts in the original complaint to distract from the newly added facts.

Through Irazola's amended complaint, Irazola identifies more examples of the pervasive and severe treatment she was subject to and that Griepentrog's preference for men was in violation of Title VII; thus, Irazola was engaged in protected activity. Irazola has noted that she entered an environment run by "mid-Western boys" who were "not used to dealing with confident women." Am. Compl. ¶ 63 (ECF No. 12). Instead of "dial[ing] it back" like she was told to, Irazola sought to be the confident woman she is and was bombarded by comments that certain women were "not worth" more salary and that "no woman was worth that" when discussing a counteroffer received by a female employee, inferring that a man may be "worth that." *Id*. ¶¶ 63-64.

While Griepentrog's and Marsh's statements without more, may not have been unlawful under Title VII, Griepentrog's and Marsh's actions and preferences towards men provide support to survive FMG's renewed Motion to Dismiss. When Irazola sought to raise awareness to Griepentrog that Hall was stealing from the company, Griepentrog told Irazola that Hall had to be "treated gently" and allowed Hall to be paid for over a month while Hall searched for a new job. *Id*. ¶¶ 82-86. When Irazola was told by Griepentrog that Irazola's "values do not fit ours," Irazola was terminated on the spot. *Id.* ¶ 68. Another employee, Andrews, directed his rage at female subordinates and FMG's leadership did nothing until there was substantial pressure from

confident women FMG was "not used to dealing with." *Id*. ¶¶ 63, 93-97. Finally, Irazola noted Wurtz as an example of another man who was treated far better than Irazola by being placed on a PIP rather than being terminated outright.[1] *Id*. ¶¶ 99-100. These combined interactions created an environment where Irazola was reminded daily that men at FMG could get away with more, and were valued higher, than women.

FMG claims Irazola added "no factual allegations to suggest that FMG was any different an environment than that described in the Complaint." To the contrary, Irazola has provided numerous instances of an environment hostile towards women, including Marsh's own assessment of Irazola's circumstances as being a "hostile work environment." Am. Compl. ¶ 66 (ECF No. 12). Hostile work environments exist "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment." *Boyer–Liberto v. Fontainebleau Corp*., 786 F.3d 264, 277 (4th Cir. 2015). Irazola, like any other employee is protected "from retaliation when she opposes a hostile work environment that, although not fully formed, is in progress." *See Boyer-Liberto,* 786 F.3d at 282. Whether the environment is objectively hostile is "judged from the perspective of a reasonable person in the plaintiff's position." *See id.* at 277 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81

[1] Irazola is surprised by FMG's footnote and confusion around why being placed on a PIP is preferential to outright termination. For one, Irazola, like any other reasonable employee, would have preferred to have known of her alleged "performance issues" and to have had the chance to remedy those "issues" prior to being terminated outright with no clarity of the alleged issues besides vague statements about values. Second, Irazola would like to clarify that an employee on a PIP still receives a paycheck to support their livelihood while a terminated employee does not receive a paycheck. Irazola intends to consult with economic damages experts to provide expert reports to fully quantify her economic damages but imagines her damages would be less if Irazola had been placed on a PIP, like her former male colleagues, prior to Irazola's termination.

(1998)). Irazola's stated concerns of this hostile work environment and comments from Griepentrog, Marsh, and observing different treatment for women than her male colleagues, combined with Irazola's refusal to "dial it back" like she was advised resulted in retaliation which commenced with her termination. Am. Compl. ¶¶ 63, 65-67 (ECF No. 12).

Irazola has stated facts sufficient to survive a motion to dismiss and to commence discovery to further clarify and elaborate on her allegations. A *prima facie* case of retaliation under Title VII requires a plaintiff show that she (1) engaged in protected activity; (2) suffered an adverse employment action; and (3) establish a causal link between the protected activity and the employment action. *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010). In a retaliation claim, an employee is protected not only when employment actions are unlawful but also when she opposes employment actions, she "reasonably believes to be unlawful." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 282 (4th. Cir. 2015). Irazola engaged in a protected activity, through her interactions with and statements to Griepentrog and Marsh, she suffered an adverse action, and she has shown there was a causal link between her protected activity and the employment action by close temporal proximity.

On two separate occasions, Irazola communicated to FMG managers about incidents of gender discrimination and a hostile work environment. Am. Compl. ¶¶ 66-67 (ECF No. 12). To have engaged in protected conduct Irazola must have "communicated to her employer a belief that the employer has engaged in … a form of employment discrimination." *DeMasters v. Carilion Clinic*, 796 F.3d 409, 418 (4th Cir. 2015) (quoting *Crawford Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271 (2009)). It also must concern subject matter that is "actually unlawful under Title VII." *Boyer-Liberto* 786 F.3d at 282. Irazola has shown this through her description to her managers of the hostile work environment Irazola faced on

account of her gender at FMG. Further, Irazola upset the culture of FMG where the owners were "not used to dealing with confident women" when Irazola expressed concerns about co-workers at FMG who were engaged in improper activity. *Id.* ¶¶ 63-74, 100. As a result, Irazola engaged in protected activity by discussing issues with Marsh, who failed to address any of Irazola's concerns.

Applicant Details

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Last Name	**Westmoreland**
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Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 1990**
JD/LLB From	**University of California, Irvine School of Law** **http://www.law.uci.edu**
Date of JD/LLB	**May 7, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of International, Transnational, and Comparative Law** **UC Irvine Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 14, 2021

Hon. Elizabeth W. Hanes
Magistrate Judge
United States District Court, Eastern District of Virginia
Spottswood W. Robinson III
and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Re: Clerkship Position

Dear Judge Hanes:

I am a rising third-year student at the University of California, Irvine School of Law seeking a position as a law clerk with your chambers for the 2022-24 term.

After spending years in the business world, in 2019 I decided to make a significant career change by enrolling in law school at UC Irvine. My experience there so far has been even more enjoyable and successful than I had hoped. Over the course of my first two years, I have received four separate Faculty and Dean's Awards, signifying first and second place in the entire class.

In addition to this growing track record of academic excellence in law, I would bring to the work the benefit of an existing MBA, as well as a seasoning received over the course of a career that has ranged from entertainment to finance. My unique personal history as both an older student and a gay man has already enriched the contributions I've been able to make in law school, and I believe they will do the same in any future work environment.

If there is anything further I might provide, please do not hesitate to contact me. I look forward to speaking with you soon.

Respectfully,

Richard Westmoreland

RICHARD WESTMORELAND

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EDUCATION

University of California, Irvine School of Law — Irvine, CA
Juris Doctor candidate · GPA 3.72 — Expected May 2022
Honors: Two Faculty Awards (highest grade in class): Statutory Analysis and Legal Profession
Two Dean's Awards (second-highest grade in class): International Law and Business Associations
One of only ten students selected for Appellate Clinic to prepare and argue a case before the Ninth Circuit during the coming 3L year
Activities: Lead Article Editor, *UC Irvine Law Review*
Staff Editor, *Journal of International, Transnational, and Comparative Law*
Pro Bono: Mississippi Center for Justice, March 2020

New York University, Stern School of Business — New York, NY
Masters in Business Administration, Management / International Business (dual major) — May 1993

University of Chicago — Chicago, IL
Bachelor of Arts, English Language and Literature — June 1990

PROFESSIONAL EXPERIENCE

University of California, Irvine School of Law — Irvine, CA
Research Assistant, Prof. Christopher Whytock, Vice Dean & Professor of Law — May 2021 – Present
Researching, preparing policy memoranda, and collecting cases for the ALI's forthcoming *Restatement (Third) of Conflict of Laws*, for which Prof. Whytock is a reporter. Focusing on the law of succession, both testate and intestate, and its treatment in different jurisdictions.

Los Angeles City Attorney's Office, Employment Litigation Division — Los Angeles, CA
Summer Law Clerk — May – August 2021
Researching and preparing litigation documents defending all City departments from labor and employment claims, including harassment, whistleblowing, retaliation, hostile work environment, and First Amendment violations, brought under Title VII, FEHA, and the state Labor Code.

University of California, Irvine School of Law — Irvine, CA
Research Assistant, Prof. Christopher Leslie, Chancellor's Professor of Law — July 2020 – Present
Researching the history and prevalence of script- and director-approval clauses in contracts between Hollywood studios and talent for an article currently in development.

University of California, Irvine School of Law — Irvine, CA
Research Assistant, Prof. Rachel Moran, Distinguished Professor of Law — May – August 2020
Researched and wrote a memorandum on the state of Latinx entrepreneurship and economic development. Updated modules for Education Law course by researching developments in the law affecting bilingual education and the impact of COVID-19 on students with disabilities.

FairWorth, Inc. — Los Angeles, CA
General Manager — January 2012 – July 2019
Oversaw all operations of a socially responsible litigation-funding firm. Assessed nonperforming investments for evidence of fraud and likelihood of claim collection. Managed numerous lawsuits for the firm, touching on breach of contract, legal malpractice, fraud, and class action defense.

(cont.)

Suntrust Real Estate Corp. Los Angeles, CA
Senior Consultant August 2007 – January 2012

Wrote and presented polished assessment reports on multifamily rental complexes around the country, generating substantial consulting business. Designed complex spreadsheet models to evaluate performance and market potential.

Self-Employed Entrepreneur West Hollywood, CA
Online Retail/Import-Export May 2000 – August 2007

Established and managed all aspects of my own enterprise, sourcing and reselling rare art and music collectibles.

National Broadcasting Corporation Burbank, CA and New York, NY
Producer July 1997 – May 2000

Solo-produced *Saturday Night Live*'s first official website, working from famed Studio 8H. Designed and built site from the ground up, editing and organizing hundreds of hours of show footage, bringing record online traffic to the network. Began at NBC in its Burbank studios, as an assistant producer.

Unisys Nederland N.V. Amsterdam, Netherlands
Summer Associate June – September 1992

Evaluated business process flow for a multinational computing-services provider. Wrote detailed specifications for custom client-management software that significantly boosted firm's productivity in handling customer service requests.

Brown & Wood LLP (now Sidley Austin) New York, NY
Corporate Paralegal October 1991 – January 1994

Worked full time while also pursuing graduate study. Organized and proofread closing documents for numerous securitizations.

Corporate Consulting Resources, Ltd. Kensington, London, UK
Analyst November 1990 – May 1991

Built spreadsheet models and prepared reports for a boutique management consultancy. Worked on projects for clients that included large British merchant banks, Deutsche Bank, and oilfield services provider Schlumberger.

Skadden, Arps, Slate, Meagher & Flom Chicago, IL
Paralegal Proofreader June 1988 – September 1990

Cite-checked and proofread documents from every practice area, on consistently tight deadlines.

SKILLS AND INTERESTS

Substantial computer experience, with advanced Excel modeling and programming skills. Have traveled extensively. Enjoy film, politics, and collecting vintage posters.

UNIVERSITY REGISTRAR — UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW

UNIVERSITY OF CALIFORNIA IRVINE

SOCIAL SECURITY NO.	STUDENT NO.	NAME OF STUDENT	
XXX-XX-3148	48187-241	WESTMORELAND,RICHARD A.	
DATE ADMITTED	**DATE OF BIRTH**	**ACADEMIC CAREER**	**MAJOR PROGRAM**
AUG 2019	01/25/XX	LAW	LAW

- PREVIOUS DEGREES -
B.A. 06/90 UNIV OF CHICAGO

- MEMORANDA -
LAW 503 - FACULTY AWARD - FALL 2019
LAW 505 - DEANS AWARD - SPRING 2020
LAW 507B - FACULTY AWARD - SPRING 2020
DUE TO COVID-19, SPR2020 LAW GRADES REQD S/U
EXCEPTION: SHORT SESSN & WTR QTR GRADES POST
PRO BONO - 1L ACHIEVEMENT (20+ HRS) - 2019-20
LAW 511 - DEANS AWARD - FALL 2020

FALL SEMESTER 2019						
STATUTORY ANALYSIS	LAW	503	3.0	A+	12.9	
PROCEDURAL ANALYS	LAW	504	4.0	A	16.0	
LAWYERING SKILLS I	LAW	506A	3.0	B+	9.9	
LEGAL PROFESSION I	LAW	507A	2.0	S		SU
LEG RESEARCH PRAC	LAW	508	1.0	S		SU
COM LAW: CONTRACTS	LAW	500	4.0	B	12.0	
TERM TOTALS: 3.629 GPA			14.0		50.8	
SPRING SEMESTER 2020						
COMMON LAW: TORTS	LAW	501	4.0	S		SU
LAW SKILLS II	LAW	506B	3.0	S		SU
LEGAL PROFESSION II	LAW	507B	2.0	S		SU
INTL LEG ANALYSIS	LAW	505	3.0	S		SU
CON ANALYSIS	LAW	502	4.0	S		SU
TERM TOTALS: 0.000 GPA			0.0		0.0	
FALL SEMESTER 2020						
FED INCOME TAX	LAW	516	4.0	B+	13.2	
BUSINESS ASSOC	LAW	511	4.0	A+	17.2	
ACCTNG FOR LAWYERS	LAW	5104	2.0	A	8.0	
EVIDENCE	LAW	514	4.0	A	16.0	
LAW REVIEW	LAW	598R	1.0	S		SU
TERM TOTALS: 3.886 GPA			14.0		54.4	
SPRING SEMESTER 2021						
CRIM PROCEDURE	LAW	513	3.0	A-	11.1	
PROPERTY	LAW	517	4.0	B+	13.2	
REMEDIES	LAW	518	3.0	A+	12.9	
ADMIN LAW	LAW	510	3.0	B+	9.9	
LAW REVIEW	LAW	598R	1.0	S		SU
TERM TOTALS: 3.623 GPA			13.0		47.1	

41.0* ATTM 41.0* PSSD 152.3* G.P.

SEMESTER CREDITS COMPLETED 62.0 UC GPA 3.715

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Elizabeth Bennett, University Registrar

AUTHENTICITY SECURITY INFORMATION ON REVERSE

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The University of California, Irvine School of Law opened in August 2009 on the semester system. Minimum full-time enrollment is 12 units. The following information is offered to assist in the evaluation of this student's academic record.

GRADING

Letter Grade:	Grade Points: (per unit)	
A +, A, A-	4.3, 4.0, 3.7	
B +, B, B-	3.3, 3.0, 2.7	
C +, C, C-	2.3, 2.0, 1.7	
D	1.0	
F	0.0	No unit credit awarded.
S ...Satisfactory	0.0	Equivalent to a grade C- or better. Not calculated in the GPA.
U ...Unsatisfactory	0.0	Equivalent to a grade D or lower. Not calculated in the GPA.
I ...Incomplete	0.0	Coursework still in progress.
IP ...In Progress	0.0	Multiple term course, graded upon completion.
NR ...No Report	0.0	No grade submitted by instructor or an unresolved discrepancy in course enrollment.

EXPLANATION OF CODES

SU	...Satisfactory/Unsatisfactory	Course taken for credit only.
U1	...Graduate Coursework	Does not apply toward law degree GPA.
WC	...Workload Credit Only	Does not apply toward graduation.

SCHOLASTIC NOTATIONS

Additional information on law school awards can be found at the law school website:

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PROBATION

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RANK

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THE UNIVERSITY OF CHICAGO

The Office of the University Registrar

CHICAGO, ILLINOIS 60637

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1 OF 2

OFFICIAL ACADEMIC RECORD

STUDENT NAME
RICHARD ALAN WESTMORELAND

BIRTH PLACE	BIRTHDATE	STUDENT NUMBER
MEMPHIS TENNESSEE	01/25/70	84-75-50

PREVIOUS INSTITUTIONS ATTENDED:
LOUISIANA SCHOOL MATH SCI/ART
HAMMOND, LA 1986

AUT 86 UNDERGRADUATE COMMON YEAR

FRENCH	101	ELEMENTARY FRENCH-1	100	A
HUM	110	READINGS IN LITERATURE-1	100	C+
MATH	100	ESSENTIAL MATHEMATICS-1	100	C
SOCSCI	101	POLITICAL ECONOMY	100	B+
PHYSED	097	PHYSICAL EDUCATION		P

WIN 87 UNDERGRADUATE COMMON YEAR

FRENCH	102	ELEMENTARY FRENCH-2	100	C+
HUM	111	READINGS IN LITERATURE-2	100	A-
MATH	101	ESSENTIAL MATHEMATICS-2	100	B
SOCSCI	102	POL. ECON. AND SOCIETY	100	B+
PHYSED	097	PHYSICAL EDUCATION		P

SPR 87 UNDERGRADUATE COMMON YEAR

FRENCH	103	ELEMENTARY FRENCH-3	100	A-
HUM	112	READINGS IN LITERATURE-3	100	B+
MATH	102	ESSENTIAL MATHEMATICS-3	100	B-
SOCSCI	103	INTERPRETATIONS OF CULTURE	100	C
PHYSED	097	PHYSICAL EDUCATION		P
PHYSED	107	PHYS ED REQUIREMENT COMPLETED		

AWARDED THE ACADEMY OF AMERICAN POETS PRIZE

AUT 87 UNDERGRADUATE ENGLISH LANG & LIT

FRENCH	201	INTERMEDIATE FRENCH-1	100	B
MATH	110	STUDIES IN MATHEMATICS-1	100	A
PHYSCI	109	SCIENCE/EARTH: THE ATMOSPHERE	100	A-
HIST	131	HIST OF WESTERN CIVILIZATION-1	100	A-

WIN 88 UNDERGRADUATE ENGLISH LANG & LIT

FRENCH	202	INTERMEDIATE FRENCH-2	100	B
MATH	111	STUDIES IN MATHEMATICS-2	100	B-
PHYSCI	108	SCIENCE/EARTH: THE EARTH	100	A
HIST	132	HIST OF WESTERN CIVILIZATION-2	100	B+

SPR 88 UNDERGRADUATE ENGLISH LANG & LIT

ARTDES	101	VISUAL LANGUAGE	100	C-
FRENCH	203	INTERMEDIATE FRENCH-3	100	C
PHYSCI	110	SCI/EARTH:ENVIRON HIST EARTH	100	B-
HIST	133	HIST OF WESTERN CIVILIZATION-3	100	B+

SUM 88 UNDERGRADUATE ENGLISH LANG & LIT

BIOSCI	114	APES AND HUMAN EVOLUTION	100	C
BIOSCI	118	BIOLOGY OF WHOLE ORGANISMS	100	B-
BIOSCI	119	CELL BIOLOGY	100	A-

AUT 88 UNDERGRADUATE ENGLISH LANG & LIT

ART H	101	INTRODUCTION TO ART	100	P
ART H	150	ART OF WEST-1:ANCIENT/MEDIEVAL	100	B
ENG	108	INTRO TO NON-FICTIONAL PROSE	100	B
ENG	178	RESTORATION AND 18TH-C DRAMA	100	A-

WIN 89 UNDERGRADUATE ENGLISH LANG & LIT

ENG	114	HISTORY OF CRITICISM	100	B-
ENG	175	MILTON	100	B+
ENG	274	FAULKNER	100	A
MUSIC	101	INTRODUCTION TO WESTERN MUSIC	100	C

SPR 89

COURSE REGISTRATION WITHDRAWN
LEAVE OF ABSENCE APPR: DEAN OF STUDENTS IN THE COLL

AUT 89 UNDERGRADUATE ENGLISH LANG & LIT

RESUMPTION OF STUDIES APPROVED

ENG	168	SHAKESPEARE-1: HISTOR/COMEDIES	100	B
ENG	198	SELECTED 18TH-CENTURY NOVELS	100	A-
ENG	229	CONRAD	100	A-

Issued to :

RICHARD A WESTMORELAND
PICK UP

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Registrar

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CHICAGO, ILLINOIS 60637

2 OF 2

NOTE: A transcript is official when it bears the University Registrar's seal and signature.

OFFICIAL ACADEMIC RECORD

STUDENT NAME			
RICHARD ALAN WESTMORELAND			
BIRTH PLACE		BIRTH DATE	STUDENT NUMBER
MEMPHIS TENNESSEE		01/25/70	84-75-50

WIN 90 UNDERGRADUATE ENGLISH LANG & LIT

ENG	155	CHAUCER: THE CANTERBURY TALES	100	B+
ENG	250	AMERICAN LITERATURE SURVEY-2	100	A
ENG	299	INDEPENDENT B.A.PAPER PREP	100	A-

SPR 90 UNDERGRADUATE ENGLISH LANG & LIT

ENG	107	INTRODUCTION TO FICTION	100	B+
ENG	257	MELVILLE	100	A-
ENG	298	READING COURSE: ENGLISH	100	A-

DEAN'S LIST 1989-90

DEGREE BA IN THE COLLEGE
ENGLISH LANG & LIT
AWARDED JUNE 1990

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NEW YORK UNIVERSITY
STERN SCHOOL OF BUSINESS - GRADUATE DIVISION
44 WEST 4TH ST. NEW YORK, N.Y. 10012
ACADEMIC TRANSCRIPT

NAME..... Westmoreland, Richard Alan	CANDIDATE FOR... MBA	PREVIOUS NON-SOD DEGREE(S):	
STUDENT ID... [redacted]-3148	MAJOR..... Mgt/IB	1. BA 06/90 UNIVERSITY CHICAGO	
BIRTH DATE... 01/25/70	MINOR/MODULE.... **********	2. *** ***** **********	
ADDRESS..... 95 Christopher St. #5D	REQUIRED CR..... 72.0	3. *** ***** **********	
New York, NY 10014		4. *** ***** **********	

COURSE	TITLE	CREDITS	GRADE
FALL 1991			
B00.2002	MATH & CALCULUS WORKSHOP	0.0	P
B07.2303	MICROECONOMICS	3.0	A
B07.2315	INFO SYSTEMS FOR MGT	3.0	A
B07.2601	ACCOUNTING I & II	6.0	A-
B07.2605	QUANT METHDS BUS DEC I&II	6.0	B+
SPRING 1992			
B07.2304	MACROECONOMICS	3.0	A-
B07.2307	MANAGING ORGANIZ BEHAV	3.0	B+
B07.2612	FIN MARKETS & INVESTMENTS	6.0	B+
B10.2303	INTRO FIN STATEMENT ANALY	3.0	A
B65.2358	CONFLICT & NEGOTIATION	3.0	B
FALL 1992			
B07.2313	MKTG CONCEPTS &STRATEGIES	3.0	B+
B07.2314	OPERATIONS MANAGEMENT	3.0	A-
B30.2381	INTL TRADE & FINANCE	3.0	B
B65.2301	ENVIR ANAL FOR INTL BUS	3.0	A-
B65.2310	FIN&MKT ANAL FOR DEC MAK	3.0	A
B65.2343	INTL BUSINESS MANAGEMENT	3.0	A
SPRING 1993			
B20.3352	INFO SYSTEMS FOR INTL BUS	3.0	A-
B65.2316	MGMT & ASSESS OF TECHNLGY	3.0	A-
B65.2370	ANAL OF ORGANIZATIONS	3.0	B+
B65.3369	GLOBAL ENVIRON RES MGMT	3.0	B+
B97.3300	BUSINESS POLICY	3.0	A
B97.3301	LEGAL&SOC CONTEXT OF BUS	3.0	A-
*********	END OF COURSE LISTING **********		

COURSE	TITLE	CREDITS	GRADE
********* THERE ARE NO COURSES LISTED IN THIS COLUMN			

TOTAL CREDITS ATTEMPTED: 72.0 TOTAL CREDITS EARNED: 72.0 OVERALL GPA: 3.5583

SOD DEGREE(S) CONFERRED:
1. MBA 05/13/93 Mgt/IB ********** 3.5583 **********
2. *** ******** ********** ********** ****** **********
3. *** ******** ********** ********** ****** **********
4. *** ******** ********** ********** ****** **********

DIRECTOR, RECORDS AND REGISTRATION
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REMARKS: Passed Business Writing Proficiency Exam 9/4/1991

PRINT DATE: 06/10/93; PAGE 1 OF 1

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing this letter in support of Richard Westmoreland's application for a judicial clerkship. Richard was a student in my course on Common Law Analysis: Torts at UC Irvine School of Law in spring 2020, and he served as my research assistant in summer 2020. Based on my experience with Richard, I am confident that he will make an excellent law clerk because of his intellectual curiosity, his strong research skills, and his fluent writing.

The spring Torts class was an unusual one, as you might well imagine. We began in January in the traditional in-person format. Richard always came to class, was well-prepared, and offered valuable insights during our discussions. Then, in March, the entire law school shifted to an online format, and we all gathered to learn remotely during the second half of the semester. The change did not quell Richard's commitment to mastering Torts, even after the law school announced that everyone would be evaluated on a pass/fail basis. He continued to log on for class and to participate in helpful ways, and his final examination demonstrated a strong mastery of tort doctrine and policy.

Richard's intrinsic interest in the law has served him well in his graded and ungraded courses. He has earned two A+s, three As, two B+s, and just one B. These high grades have come in foundational classes like Statutory Analysis: Criminal Law, Procedural Analysis: Civil Procedure, and Evidence as well as corporate law classes like Business Associations and Accounting for Lawyers. Richard also has earned two Faculty Awards for the highest grade in the class (Statutory Analysis and Legal Profession) as well as two Dean's Awards for the second highest grade in the class (International Law and Business Associations). It is noteworthy that two of those awards came in the ungraded spring 2020 term, confirming Richard's intrinsic motivation to make the most of his courses regardless of the grading protocol. As you can see, the range of classes in which Richard has excelled show the breadth of his academic interests as well as the depth of his mastery of law.

In summer 2020, I hired Richard to gather research materials on Latinx economic participation. Recently, some leaders have suggested that growing Latinx market power could be a more reliable path to full inclusion in the United States than civil rights and the public square. Richard did a terrific job of gathering research on Latinx workers, consumers, and entrepreneurs. He moved beyond the statistics to consider some of the mechanisms that Latinx, especially immigrants, use to overcome their lack of access to capital. For example, tandas and cundinas allow immigrants to draw on social networks to assess who is reliable enough to participate in resource sharing that depends heavily on trust. Richard prepared a thorough and thoughtful memorandum that summarized his findings. The document was beautifully written and a genuine pleasure to read.

Richard came to UC Irvine School of Law after obtaining a Masters in Business Administration from New York University and working for many years in the business world. His decision to enroll in law school therefore was a deliberate and reflective one. He has invested a great deal in making the most of his legal education, not only studying hard for his classes but also serving on law journals, taking advantage of clinical opportunities, participating in pro bono activities, and working as a research assistant. I am sure that all of these experiences will serve Richard well if he has the opportunity to serve as a law clerk in your chambers. As a result, I recommend him without reservation, and I very much hope that you will give his candidacy serious consideration.

Sincerely,
Rachel F. Moran
Distinguished Professor of Law

Rachel Moran - rmoran@law.uci.edu - (949) 824-9949

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I write to recommend Richard Westmoreland for a clerkship in your chambers. Richard is the strongest clerkship candidate I've had in at least the last ten years, when I visited at NYU. His writing ability, communication skills, professionalism, and ability for independent thought are simply outstanding.

I am a Professor of Law at UC Irvine and have been teaching tax and business law for twenty years. I've taught at several law schools, including at NYU, Columbia, UCLA, and Georgetown. After law school, I clerked for Judge Blane Michael (4th Circuit) and Judge Alex Kozinski (9th Circuit), so I have some familiarity with what is necessary to succeed in demanding clerkship environments. I rarely write clerkship letters but made an exception here for Richard.

Richard was a student in my Business Associations class in the Fall of 2020. He received one of two A+ grades in the class. It was my first time teaching Business Associations, and it was on Zoom, so I was really quite unsure about the quality of the exams I'd be grading. Two exams—one of which was Richard's—were not just excellent, but perhaps the best exams I've ever read in twenty years. Either one would serve as a model answer better than what I could have written myself. Richard's exam not only spotted the right issues but presented the relevant statutory and doctrinal law in a manner that was concise, clear, well-organized, and persuasive. His policy arguments were insightful. I gave the other paper the highest grade in the class, but the quality of the two exams really made the decision a coin flip, so each received an A+ (a grade I hadn't given out in about ten years).

Richard's participation in the class was excellent. He did not dominate the discussion. Instead, he chose to participate when the dialogue slowed—which happens all too often on Zoom. I sometimes found that Richard's classmates were quick to volunteer left-leaning arguments (say, in favor of stakeholder primacy) but silence would follow when I asked the class to explore more conservative viewpoints. Richard was particularly good at making conservative, pro-market arguments, even when those arguments did not reflect his own preferences or ran counter to something I had argued myself. These contributions came not from his own policy preferences but his understanding that the discussion would not be complete, or the classes' understanding of the topic solid, until both sides of the argument were explored. Furthermore, he understands the sorts of arguments that appeal to judges and how those arguments differ from the arguments one might make to policymakers. He is always polite and respectful, brings a positive attitude to the table, and he gets along with his classmates (as further evidenced by his selection to be lead articles editor on the law review).

As you can see from Richard's transcript, his performance in Business Associations was not unusual, with two faculty awards (1st in the class) and two deans awards (2nd in the class). I've not seen a stronger transcript at UCI.

Richard comes to a legal career called to public service having already had a successful career in business. His business career has not made him cynical or jaded. Rather, it has given him the wisdom and good judgment that is sometimes lacking in some of his classmates. This maturity is of course evident in his work ethic and consistent professionalism, but also in more subtle ways, like the careful balance of his arguments, knowing when to talk and when to allow others to jump in, and in his ability to think through the practical consequences of different potential rules.

Richard has a bright future in public policy, and when he is finished clerking I will be lining up calls for him to work with some of my colleagues in the D.C. policy world or as a Congressional or agency staffer. It's difficult to find recent graduates who have both superior intellectual firepower and an interest and fluency in business law and policy, and Richard has a bright future ahead. I hope you will consider having him start that future in your chambers.

Please do not hesitate to call or email if I can be of further assistance.

Very truly yours,

Victor Fleischer

Victor Fleischer - vfleischer@law.uci.edu

Victor Fleischer - vfleischer@law.uci.edu

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I understand that Richard Westmoreland has applied for a clerkship in your chambers. He has asked me to write a letter supporting his application and I am delighted to do so. Richard is insightful, funny, and hard-working. He has my full support.

I first met Richard as a law student during the Fall 2019 when he was a student in my class, Procedural Analysis (which is called "Civil Procedure" at almost every other law school). The class had more than 50 students. He stands out for providing some of the most thoughtful commentary during that course. He did very well in that course earning an "A" for the course. That semester, he also nabbed an "A+" in Statutory Analysis (which is called "Criminal Law" at most other law schools) which was also the highest score in that class. The pandemic began during the Spring 2020 semester, which caused the law school to issue a mandatory "pass/no pass" grading policy. Still, there are some clues that Richard continued to perform well that semester. Most notably, he earned the highest grade in Legal Profession and the second highest grade in International Legal Analysis. Richard continued his strong academic performance into his 2L year earning 3 grades in the "A" range during Fall 2020 and once again securing the top grade in a class, this time for Business Associations.

During Spring 2021, I was delighted to reconnect with Richard as a student once again in my Administrative Law class. This is a famously hard class that asks students to grapple with abstract doctrines related to judicial deference and highly technical statutory rules related to agency processes. Once again, Richard was one of the most reliable and thoughtful participants in class discussion, which was especially impressive given that we were holding the class online. Richard ended up earning a B+, which is a dip from his grade point average, but I should point out that he barely missed out on an "A-." And in any event, he continued to perform well in other classes as evidenced by his A- and A+ in Criminal Procedure and Remedies, respectively.

Beyond his academic excellence, Richard has been a wonderful presence at the law school. No doubt, this has to do with Richard's somewhat unconventional path to law school. Richard graduated from the University of Chicago with a B.A. in English in 1990—more than 30 years ago. He was only 20 years old at the time and while he expressed an interest in going to law school to some attorneys he was working for as a paralegal, they steered him away from law and into business. That is how he ended up being a 23-year-old MBA graduate. After working a variety of jobs—including as a producer for Saturday Night Live's first website—Richard decided that he should have followed his initial instincts and found his way into law school as a student in search of a second career. UCI has been, and the legal profession will be, the better for it. I have enjoyed all of my conversations with Richard whenever we met during office hours or chatted after class (pre-pandemic). Some of this is because of the thoughtful nature of the questions he poses but a lot of this has to do with the mature and self-possessed way he moves through the world.

Some of my colleagues must have taken note as well. During his 1L summer, Richard worked as a research assistant for two of my colleagues: Chancellor's Professor Christopher Leslie and Distinguished Professor Rachel Moran. These are among the most respected members of our faculty who set very high standards for their students. That he was able to secure employment with them speaks volumes for Richard's intelligence, maturity, and work ethic. During his 2L summer, Richard will work for the Los Angeles City Attorney's office where he will get exposure to a variety of litigation issues related to labor and employment law. I'm not sure yet what Richard will do after graduation, but I am positive that wherever he lands he will do so with his feet running and moving seamlessly into the profession. If Richard is lucky enough to secure a clerkship in your chambers, no doubt he will learn a ton, but I should emphasize that there will be "no assembly required" in training Richard. He will pick things up quickly and learn as he goes.

I hope you give Richard's application serious consideration. He has my full support. If you have any questions, please do not hesitate to contact me either by phone or email.

Sincerely,

Stephen Lee
Associate Dean for Faculty Research and Development and Professor University of California, Irvine School of Law

Stephen Lee - slee@law.uci.edu - (949) 824-3731

June 14, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Re: Reference for Richard Westmoreland

Dear Judge Hanes:

I enthusiastically recommend Richard Westmoreland for a judicial clerk position in your chambers. Richard has been an impressive student at the University of California, Irvine School of Law. As a student in my Common Law Analysis: Contract Law course during his first year of law school, Richard was engaged and engaging. Richard approaches all problems with the perfect mix of maturity and enthusiasm. He is methodical with boundless energy, a combination that allows him to understand the relevant legal landscape clearly and to arrive at informed conclusions. Because law is his second career, Richard has more real-world experience than most law students. He exercises excellent judgment.

I had – and enjoyed – many conversations with Richard outside of class, during office hours, and at school events. One of the things we discovered was our common interest in the business of movie making. We bonded over the facts of one foundational contract case involving a movie studio breaching its contract with Shirley MacLaine. Although not discussed in depth in the opinion, the case raises important legal and social issues about contracting in Hollywood.

Because of his solid performance in class, I asked Richard to be my research assistant. Since last summer, he has performed both traditional and archival research. As expected, he has approached this project with enthusiasm and perseverance. His work product has been impressive. I have greatly appreciated both his thorough and efficient research and his commitment to the project. My scholarly project would not be possible without Richard's work.

From my experience working with Richard, I know that he will be an excellent judicial clerk. He will approach every assignment with gusto. He is thoughtful and deliberative. You can be confident in the accuracy and thoroughness of his work product.

Finally, Richard is a nice guy with a great sense of humor. He gets along well with everyone. He is the perfect blend of laidback and diligent. I hope that you will grant him an interview. If you have any questions, please feel free to contact me at (949) 824-5556 or cleslie@law.uci.edu.

Sincerely,

Christopher Leslie
Chancellor's Professor of Law

RICHARD WESTMORELAND
153 S. CRESCENT DR., APT. 2
BEVERLY HILLS, CA 90212
310.999.4135
RWESTMOR@UCI.EDU

WRITING SAMPLE

The attached writing sample is an assignment I drafted during my second semester of Lawyering Skills. I was asked to prepare a Motion for Summary Judgment on behalf of a residential co-operative, to be filed in the Southern District of New York. The plaintiffs in the scenario were an expectant couple, owners of a unit on an upper floor, who claimed that the co-op board had discriminated against them under the Federal Housing Act by suggesting that they move to the ground floor—where most of the building's families with children lived—after they had asked permission to construct a nursery room in their unit.

I independently conducted all legal research for the assignment, and I exclusively drafted the entire brief. The assignment was reviewed once by my professor, Rachel Croskery-Roberts, who told me that my initial draft was the "strongest" she had seen "in years." In the interests of brevity and of highlighting persuasive writing ability, I have omitted all but the Argument and Conclusion sections. I would be happy to provide the complete brief on request.

ARGUMENT

I. THE COURT SHOULD GRANT DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT BECAUSE NO GENUINE DISPUTES OF MATERIAL FACT REMAIN AS TO COUNT ONE OF THE COMPLAINT.

Because there are no genuine disputes of material fact as to Plaintiffs' claim under section 3604(c) of the FHA, the Court should grant Defendant's Motion for Partial Summary Judgment. Although the initial burden is on the moving party, a movant need show only that there remains no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute is not genuine unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). A fact is not material unless it "might affect the outcome of the suit under governing law." Id. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat" a properly supported motion. Id. at 247–48.

The court "shall grant" summary judgment for the moving party where, after having had adequate time for discovery, the nonmoving party is unable to show a genuine issue as to a material fact on which that party will bear the burden of proof at trial, Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986), and where judgment as a matter of law against that party is appropriate, Fed. R. Civ. P. 56(a). The nonmoving party "may not rest upon the mere allegations or denials of [its] pleadings." Fed. R. Civ. P. 56(e). Rather, to avoid summary judgment, "the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial*.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). In reviewing the evidence, the court must view all facts and draw all inferences in

the light most favorable to the nonmoving party, Anderson, 477 U.S. at 255, but the court need consider no evidence other than the materials to which the parties cite, Fed. R. Civ. P. 56(c)(3). Because no reasonable jury could possibly find for Plaintiffs, the Court should grant Defendant's Motion for Partial Summary Judgment.

II. ANALYZED UNDER THE McDONNELL DOUGLAS FRAMEWORK, THE EVIDENCE SHOWS CONCLUSIVELY THAT DEFENDANT DID NOT ATTEMPT TO STEER PLAINTIFFS IN VIOLATION OF THE FAIR HOUSING ACT.

Plaintiffs have not produced evidence sufficient to convince any reasonable juror that Defendant attempted to "steer" them unlawfully under the FHA, and Plaintiffs' claim therefore cannot survive summary judgment. In the FHA context, steering is a practice by which actors in the real estate market promote patterns of segregation by discouraging protected homeseekers from pursuing housing opportunities in particular areas. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 366 & n.1 (1982); Llanos v. Estate of Coehlo, 24 F. Supp. 2d 1052, 1057 (E.D. Cal. 1998). Section 3604(c) of the FHA makes it unlawful "[t]o make . . . any . . . statement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . familial status . . . ." 42 U.S.C. § 3604(c). When a person attempts to steer a member of a protected group by making oral statements, the speaker may violate section 3604(c). Fair Hous. Cong. v. Weber, 993 F. Supp. 1286, 1293 (C.D. Cal. 1997).

Where, as here, a plaintiff fails to produce any direct evidence of discrimination, courts analyze FHA claims under the burden-shifting paradigm set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Soules v. U.S. Dep't of Hous. & Urban Dev., 967 F.2d 817, 822 (2d Cir. 1992) (concluding that it was "not improper" to apply the McDonnell Douglas scheme to a case arising under section 3604(c)); see also

Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1036–43 (2d Cir. 1979) (applying McDonnell Douglas procedure to a case brought under section 3604(a)). To sustain its claim, a plaintiff has the initial burden of presenting evidence from which a reasonable jury could conclude that a prima facie case of discrimination exists. Soules, 967 F.2d 817 at 822. If successful, the burden then "shifts to the defendant to articulate a legitimate, nondiscriminatory rationale for the challenged action." Wentworth v. Hedson, 493 F. Supp. 2d 559, 564 (E.D.N.Y. 2007). Once the defendant meets its burden, the plaintiff must then adduce evidence from which a reasonable jury could conclude that the proffered reason is pretextual. Soules, 967 F.2d at 822. Here, Plaintiffs' proof falls short at every hurdle of the McDonnell Douglas analysis, and their claim thus fails.

A. Plaintiffs Cannot Establish a Prima Facie Case Because No Ordinary Listener Could Interpret the Challenged Statement as Expressing an Impermissible Preference Based on Plaintiffs' Familial Status.

Plaintiffs have failed to establish a prima facie case because no ordinary listener could interpret Statman's words as expressing discriminatory preference, either facially or tacitly. Courts evaluate a statement under section 3604(c) on the basis of whether it would "suggest[] to an ordinary reader [or listener] that a particular [protected group] is preferred or dispreferred for the housing in question." Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir. 1991). The ordinary listener "is neither the most suspicious nor the most insensitive of our citizenry." Id. at 1002. The test is "whether the ordinary listener would understand that a preference is being communicated." Weber, 993 F. Supp. at 1293. Although facial and tacit expressions of an impermissible preference are both prohibited, Soules, 967 F.2d at 824–25, Statman's statement is of neither proscribed type, and Plaintiffs therefore cannot make out a prima facie case.

First, no reasonable jury could conclude that Statman's words expressed an impermissible preference on their face. Facially discriminatory statements refer to a protected group in such a way that it would be clear to an ordinary listener that a prohibited preference is being expressed. Weber, 993 F. Supp. at 1291. For example, the Weber court found that a written policy unconditionally limiting children's use of building facilities facially violated section 3604(c). Id. Unlike the policy in Weber, Statman's statement that Plaintiffs "should think about moving to a different apartment" mentions neither children nor families. J. Findley-Smith Dep. 3:7–9. Moreover, as Plaintiffs concede, Defendant has no policy restricting where its residents may live. Id. 5:30–37. Because no ordinary listener could interpret the statement as expressing a prohibited preference on its face, neither could any reasonable juror.

Nor could a reasonable jury find that the statement constituted a tacit expression of a discriminatory preference. A tacitly expressed preference is one that "would discourage an ordinary reader [or listener] from" pursuing a given housing opportunity. Ragin, 923 F.2d at 999–1000. In evaluating whether a speaker has tacitly expressed a preference, "context and timing are everything." Wentworth, 493 F. Supp. 2d at 567. Importantly, statements that merely inform about the availability of other options, but do not suggest an impermissible preference on the part of the speaker, do not violate section 3604(c). Llanos, 24 F. Supp. 2d at 1058. For example, the Llanos court considered context when evaluating the statement "we have a family section for people with children," made to a tenant during an unsolicited call from a building manager. Id. Had the manager merely informed the tenant of a unit's availability, the FHA would not have been violated. Id. But because the complex was openly segregated and because the

manager indicated a preference for that practice to continue, the Llanos court found that the statement *was* tacitly discriminatory. Id. In Mancuso v. Douglas Elliman, LLC, however, defendant real estate agent's statements indicating an unwillingness to rent to plaintiff father, whose disabled daughter used a wheelchair, were found *not* to be tacitly discriminatory, when considered in the context of other evidence that tended to show that avoiding damage to the unit was the actual underlying concern of its owner. 808 F. Supp. 2d 606, 628 (S.D.N.Y. 2011).

Unlike in Llanos, where the defendant initiated contact with the plaintiff, here Plaintiffs themselves cornered Statman in the lobby and pressed for information about their desired second bedroom. J. Findley-Smith Dep. 2:38–3:3. Statman responded merely by informing Plaintiffs that a unit meeting their declared needs was already available, id. 3:7–8, a statement of a type that the Llanos court explained would not, "[s]tanding alone," violate the FHA, Llanos, 24 F. Supp. 2d at 1058. Furthermore, the tenant in Llanos interpreted the manager's statement in the context of a well-known policy of family apartheid, leading the court to find the statement tacitly discriminatory "under the totality of the circumstances." Id. Even Mr. Findley-Smith concedes that Kennedy Manor has no such policy. J. Findley-Smith Dep. 5:30–32. As did the plaintiff homeseeker in Mancuso, Plaintiffs here improperly attempt to cabin Defendant's "isolated words," 808 F. Supp. 2d at 627, and suggest that this Court discount the context in which they were heard. Families live on multiple floors at Kennedy Manor. Compl. ¶ 13. Those who choose to live on the ground floor most likely do so because they prefer its more spacious units, not because of any purported preference of Defendant's. Just as this Court found in Mancuso, it should again find that Defendant's statement,

taken in context, did not violate the FHA. Because Statman's words could not be interpreted by an ordinary listener as either a facial or a tacit expression of an impermissible preference, Plaintiffs have failed to establish a prima facie case.

B. Furthermore, Defendant Has Produced Evidence of Three Legitimate and Nondiscriminatory Business Reasons, Any One of Which Successfully Shifts the Burden Back to Plaintiffs.

Furthermore, Defendant has met its burden at the second step of the McDonnell Douglas analysis. "[A]mong the circuits, the Second Circuit has stated a relatively light burden for defendants." Burnett v. Venturi, 903 F. Supp. 304, 311 (N.D.N.Y. 1995). To succeed, a defendant need offer only a single "legitimate, nondiscriminatory business reason," id., which is not "merely hypothetical," Robinson, 610 F.2d at 1040. Defendant has provided three.

1. Second Circuit precedent demonstrates that Defendant's rationale in seeking to prevent excessive noise is a legitimate, nondiscriminatory business reason sufficient to meet its burden at this stage.

Defendant's first proffered reason, avoiding excessive noise, is a legitimate, nondiscriminatory rationale sufficient to shift the burden back to Plaintiffs. Soules, 967 F.2d at 826. In Soules, the Second Circuit noted with approval a lower court's finding that "securing quiet neighbors" for an elderly couple downstairs was a legitimate, nondiscriminatory business reason for inquiring whether the child of a prospective tenant was "noisy." Id. at 823, 826. Indeed, as the court pointed out, "[i]f sufficiently noisy, tenants can be deemed a nuisance and can be evicted." Id. at 825–26. Here, in striking parallel, Defendant sought to minimize disturbance to the Shones, an older couple living beneath Plaintiffs, who had already filed a complaint detailing Plaintiffs'

history of making disagreeable noise, Statman Dep. 2:14–15, and who objected to Plaintiffs' construction plans, id. 3:23–24. Mr. Findley-Smith himself concedes that noise prevention is a concern for Defendant. J. Findley-Smith Dep. 5:27. Given that noisy tenants may readily be evicted in a rental context, certainly it is reasonable for Kennedy Manor to consider noise when deciding whether to grant a noisy construction request. The Court should thus find that the burden has shifted back to Plaintiffs.

2. Defendant's goal of avoiding and preventing litigation is a legitimate and nondiscriminatory business reason sufficient to meet its burden at this stage.

Defendant's second proffered rationale, that of avoiding lawsuits against the housing association, also satisfies Defendant's light burden. The goal of preventing litigation, even when the lawsuit at issue is entirely speculative, can be a legitimate business rationale that suffices to shift the burden back to a plaintiff. Broome v. Biondi, 17 F. Supp. 2d 211, 217 (S.D.N.Y. 1997). In Broome, for example, the defendant housing cooperative's sole cited reason for denying plaintiffs' sublet application was the unfounded notion of certain board members that the African-American plaintiffs seemed "confrontational and litigious." Id. The Southern District found that the Broome defendant's proffered rationale satisfied its burden under the McDonnell Douglas scheme. Id. at 218. Far surpassing the defendant in Broome, however, Defendant has here produced evidence not of baseless and suspect speculation, but instead of an actual, documented threat of litigation made by Mr. Shone to Ms. Wheeler. Wheeler Dep. 2:21–24. Because the second legitimate reason proffered by Defendant, avoiding litigation, is supported by evidence far more solid than the mere conjecture deemed satisfactory in Broome, the Court should find Defendant's burden satisfied.

3. Defendant's desire to ensure the safety of its residents is a legitimate, nondiscriminatory business rationale that satisfies Defendant's burden at this stage.

Defendant's goal of promoting resident safety is a third actual reason that is sufficient to shift the burden back to Plaintiffs. See Khalil v. Farash Corp., 260 F. Supp. 2d 582 (W.D.N.Y. 2003). In Khalil, plaintiff parents claimed that a rule against congregating in areas adjacent to rental apartments violated the FHA, in that defendant landlord selectively enforced the rule against children. Id. at 584. In conducting its McDonnell Douglas inquiry, the Khalil court observed that "certainly *some* restrictions on children's activities may be justified by safety considerations." Id. at 590. The logical corollary implied by this finding is that informed *parents* are the proper parties to make decisions about some of the remaining safety issues. Yet even so, the court found that defendant's proffered reason—its desire to ensure the children's safety—was a legitimate business rationale that met the defendant's burden. Id. In the instant case, Defendant took no decisions at all out of Plaintiffs' hands, but instead simply imparted to Plaintiffs the very sort of information they might require to make an educated parental decision. Both Board members deposed have testified to the Board's concern for resident safety at the September 4 meeting. Wheeler Dep. 3:8–10; Statman Dep. 4:2–16. Because the goal of maintaining safety has been found to satisfy a defendant's burden at this stage, the Court should find Defendant's burden met.

All three of the actual reasons provided by Defendant are meritorious, and any one of them is independently sufficient to shift the burden back to Plaintiffs. No reasonable jury could conclude otherwise, given the weight of the undisputed evidence in Defendant's favor. Defendant has thus met its burden.

C. No Reasonable Jury Could Find Defendant's Proffered Reasons to Be Pretextual Because Overwhelming Evidence Supports the Conclusion That They Were Defendant's Actual Reasons.

Finally, Plaintiffs can convince no reasonable jury that the legitimate reasons Defendant has proffered are pretextual, because the evidence demonstrates conclusively that they were its actual reasons for making the challenged statement. In evaluating whether a given rationale is pretextual, the inquiry is not whether the stated reason is "unwise or unreasonable," but is rather "whether the proffered reason is the actual reason . . . ." Broome, 17 F. Supp. 2d at 217. Where, in cases much weaker than Defendant's, a party advances an entirely subjective justification, courts will wisely view that rationale with skepticism. Robinson, 610 F.2d at 1040. However, courts more readily accept even subjective reasons as the actual reasons "where a defendant provides objective evidence indicating" truthfulness. Soules, 967 F.2d at 822. In the instant case, each of the three actual reasons proffered by Defendant is objective in nature and, moreover, each is also supported by highly persuasive objective evidence. To sustain their claim, Plaintiffs must show that a reasonable jury could possibly find in their favor. The undisputed factual record renders this task impossible.

First, the evidence decisively demonstrates that the goal of preventing unwarranted noise was one of Defendant's actual reasons for offering Plaintiffs a larger home on the first floor. Well before Statman made the challenged statement, the Board discussed problems with excessive noise caused by Plaintiffs, when Mr. Shone filed his formal noise complaint in August 2019. Shone Dep. 2:31–32, 3:40–4:1. That complaint notified the Board of overloud, disagreeable sounds coming from Plaintiffs' unit, late into the night. Shone Dep. 2:16–21. Mr. Shone's complaint also described Plaintiffs'

"raucous" party of August 3, 2019, that lasted until about midnight. Id. 2:25–26. Plaintiffs concede that "about thirty" people attended the festivities, that alcohol was served, J. Findley-Smith Dep. 4:16, and that their music was "too loud," id. 4:18–19. At its meeting on August 7, the Board admonished Plaintiffs to curtail their noise-making during unreasonably late hours. Id. 4:41–42. When Plaintiffs asked to make structural changes to their unit on August 23, Statman's first reaction was to inquire about the potential noise disturbance to neighbors. Id. 2:10–14. At the September 4 meeting, members of the Board expressed concerns "about the noise level" that would attend the project. Statman Dep. 4:1. Given the overwhelming objective evidence of the Board's awareness of Plaintiffs' excessive noise, of the Board's deliberations on the topic, and of the affirmative steps it took to address the issue, no reasonable jury could find that Defendant's concern about noise was not an actual reason for the statement at issue.

Defendant's concerns about possible litigation are likewise supported by the objective evidence, and Plaintiffs cannot demonstrate otherwise. As the record indicates, the Board was both aware of and concerned about potential litigation by the Shones well before Statman's September 20 statement. Statman Dep. 4:11. The rancor between Plaintiffs and the Shones was evident at the Board meeting of August 7. Wheeler Dep. 1:29–32. Both Statman and Mr. Shone describe relations between the couples as a "feud." Statman Dep. 2:16; Shone Dep. 3:25–30. Notably, Mr. Shone did not categorically deny having made the veiled threat to Ms. Wheeler on August 31 that "people might sue." Wheeler Dep. 2:21–24; see also Shone Dep. 4:12–19. Yet even if, as Plaintiffs allege, Ms. Wheeler misremembered Mr. Shone's exact words, she certainly relayed them to the Board, which took them to be true. Wheeler Dep. 2:28–30. At the

September 4 meeting, the Board worried about Shone's reaction if it approved Plaintiffs' wall, and members expressed fear that he "would wreak havoc." Statman Dep. 4:10–11. All evidence in the record supports Defendant's contention that the goal of avoiding litigation was an actual motivation, and Plaintiffs are thus unable to show this reason to be pretextual.

Finally, a reasonable jury could only find that Defendant's concern for resident safety was also an actual reason, because there is overwhelming evidentiary support for that conclusion as well. Both Ms. Wheeler and Statman testified that safety was indeed a concern for Defendant, and that the subject was raised at the Board's September 4 meeting. Wheeler Dep. 3:8–10; Statman Dep. 4:2–16. Long before his statement to Plaintiffs, Statman was motivated by safety concerns to suggest a less risky alternative to open-air balconies to Mandy and Joe Smith, powerful evidence that his apprehensions are neither fleeting nor newly fabricated. Statman Dep. 6:19–23. Mr. Findley-Smith himself admits that the Board "thinks there might be some sort of safety concerns like keeping kids away from balconies." J. Findley-Smith Dep. 5:23–24. In light of the entirely one-sided evidence in the record that Defendant was indeed concerned with maintaining resident safety, the Court should find that Plaintiffs have fallen short of meeting their burden.

Because all evidence before the Court decisively demonstrates that Defendant's proffered business reasons were in fact its actual reasons, no reasonable jury could find that any of them are pretextual. Plaintiffs' Count One should therefore be dismissed.

CONCLUSION

The facts of this case are clear, as is the law upon which the Court must base its ruling. The undisputed evidence conclusively demonstrates that no ordinary listener could understand Statman's words to express an impermissible preference, and that the actual reasons for his statement are legitimate and nondiscriminatory.

Despite having had the full benefit of discovery, Plaintiffs have produced no specific evidence to support the bare allegations on which they will bear the burden of proof at trial. Based on the facts set forth above, no reasonable jury could possibly find that the challenged statement violated § 3604(c) of the FHA, and the Court should thus grant Defendant's Motion for Partial Summary Judgment. Defendant therefore respectfully requests that this Court grant its Motion and dismiss with prejudice Count One of Plaintiffs' Complaint.

DATED: March 22, 2020

Respectfully submitted,

By: 

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Applicant Details

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Applicant Education

BA/BS From	**University of Washington**
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JD/LLB From	**Brooklyn Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23302&yr=2009**
Date of JD/LLB	**May 20, 2017**
LLM From	**Georgetown University Law Center**
Date of LLM	**June 4, 2020**
Class Rank	**50%**
Law Review/ Journal	**Yes**
Journal(s)	**Brooklyn Journal of International Law**
Moot Court Experience	**No**

Bar Admission

Admission(s)	**Other, District of Columbia, Florida, New York**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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The Hon. F. Michael Kruse
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I worked directly under Chief Justice Michael Kruse as his principal law clerk. Chief Justice Kruse is familiar with my work product as a Judicial Law Clerk. Due to the COVID-19 pandemic, Justice Kruse is limiting his time in chambers.

In the event you cannot get a hold of Chief Justice Kruse, my alternative reference at the high Court is Jon Clemens.

Jon Clemens
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Jon Clemens interviewed and hired me for the position of Judicial Law Clerk at the High Court of American Samoa and is familiar with the functions of my employment and my role as it pertains to clerking for Chief Justice Kruse.

Sarah Thomas
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I worked directly under Sarah Thomas, Managing Partner at Jones Jones, LLC, from August 2017-June 2019. Mrs. Thomas hired me out of law school and is familiar with my work product as a practicing attorney.

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I worked with Kathleen Ginnane, Partner at Jones Jones, LLC, from August 2017-June 2019. Mrs. Ginnane is familiar with my work product as a practicing attorney.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

DAVID WIESNER

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Dear Judge Hanes,

I am writing to apply for the two-year clerkship in your chambers beginning in August 2021. I am currently working as a judicial law clerk for the Chief Justice of the High Court of American Samoa, the highest federal, state, or territorial court in the U.S. Territory of American Samoa. My clerkship was originally contracted for one year, however, due to the strict COVID-19 travel restrictions placed on American Samoa, the Chief Justice extended my contract for an additional year until August 2021. I am a 2017 graduate of Brooklyn Law School and have an LL.M. in Securities and Financial Regulation from Georgetown University Law Center. I am seeking to clerk in your Richmond chambers due to my desire to work as a government attorney in the DC-Maryland-Virginia area where my wife and I plan to raise our growing family.

During law school, I was a Student Honors Intern at the U.S. Securities and Exchange Commission's New York Regional Office and interned with the Trial Unit in the Division of Enforcement. I also served as Associate Managing Editor of the *Brooklyn Journal of International Law*. I formerly worked at a New York City law firm named Jones Jones from 2017-2019. Jones Jones facilitated my step into the legal profession and allowed me to develop a wealth of practical lawyering experience in a high-volume insurance defense practice. I stepped down from my position at Jones Jones at the end of May 2019 to settle into my new role as a judicial law clerk in American Samoa. The High Court of American Samoa has exclusive territorial and select federal jurisdiction and handles both trial and appellate criminal and civil matters. I handle all my judge's file review, research, and opinion writing responsibilities. Felony criminal matters occupy about 75% of the Chief Justice's docket. Now, with some litigation and clerkship experience, I am galvanized to clerk in a federal court where I can learn from an experienced judge, develop my own legal acumen, and ultimately, become an advocate for the people I hope to one day represent as a government attorney.

What I can offer is hard and meticulous work combined with an ability to operate independently within tight deadlines. I believe the combination of professional experience and legal education I possess is well suited to cases in the Eastern District of Virginia. My LL.M. is in Securities and Financial Regulation and my background includes: (1) a comprehensive knowledge of securities laws, financial products, and investment strategies, (2) an understanding of motion practice and federal civil and criminal procedure, and (3) experience managing a heavy case load of complex disputes. Furthermore, I have excelled in a variety of systems and organizations, which demonstrates the softer skills, including integrity and teamwork, that will allow me to integrate and hit the ground running.

Enclosed please find my resume, unofficial law school transcripts, recommendations, and writing sample. If there is any additional information I can provide to supplement an assessment of my qualifications please let me know. My writing sample is a draft of an order denying a motion for preliminary injunction. Plaintiffs challenged the American Samoa Government's COVID-19 public gathering restrictions as unconstitutional and sought interlocutory relief, which was denied.

I look forward to the potential of meeting you for an interview. Thank you for your time and consideration.

All the best,

David Wiesner, Esq.

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BAR ADMISSIONS
Florida, New York, District of Columbia, American Samoa.

EDUCATION
Georgetown University Law Center, Washington, D.C.
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Brooklyn Law School, Brooklyn, NY
Juris Doctor, 2017
Honors: *Brooklyn Journal of International Law*, Associate Managing Editor

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Bachelor of Arts in Political Science, 2013

EXPERIENCE
Chief Justice Michael Kruse, High Court of American Samoa, Pago Pago, AS
Judicial Law Clerk August 2019-August 2020

- As a law clerk, I assist the Chief Justice in drafting opinions, reading and evaluating briefs and arguments, and recommending action on issues at the criminal and trial levels. I also serve as a law clerk for appellate panels at the high court and provide research and bench memoranda to the panels and assist in drafting appellate opinions.
- In appellate matters, I read the briefs submitted by both parties and analyze the arguments in light of the trial court's opinion and order. I then research the arguments and provide memoranda to the appellate panel. At the criminal trial level, I advise the Chief Justice on all relevant statutes or procedures at issue. I recommend accepting or denying plea deals between defendants and the prosecuting American Samoa Government and recommend whether to adopt the sentence recommended by the High Court's Probation Office.
- In civil cases, I review all motions and briefs submitted by the parties and provide recommendations to the Chief Justice based on applicable case law and the American Samoa Rules of Civil Procedure, which mirror the Federal Rules of Civil Procedure.
- My primary role is to determine the quality, accuracy and relevance of information for cases appearing before appellate panels and the Chief Justice. This requires the ability to communicate orally and in writing, to brief, explain, advocate, represent, train, instruct, in an effective manner, logically and concisely, to my judge, opposing counsels in the case, and ultimately to the general public.
- I assist in drafting and reviewing all final and interim opinions and orders prior to their release, offering input on whether additions or omissions should be made. This requires the ability to write clear and concise legal documents.
- I evaluate documentary and testimonial evidence to determine whether sufficient evidence exists to support a finding by the High Court. Appellate panels and the Chief Justice do not look at any filings, evidence, or new case information before I read and analyze the material first.
- Nearly every task at the High Court requires me to conduct legal research, prepare opinions and furnishing advice on a wide variety of matters pertaining to the interpretation and application of laws, regulations, and other directives affecting the laws and regulations in American Samoa. I organize work, set priorities, and determine short- or long-term goals and strategies to achieve them. I am the Chief Justice's only law clerk. This position involves all aspects of litigation on both territorial and federal issues and involves extensive research and writing.
- I am also tasked with selecting, editing, and compiling cases for the American Samoa Reporter, the official, hard-copy reporter for American Samoa's courts.

Jones Jones, LLC, New York, NY
Associate Attorney August 2017-June 2019

- Jones Jones was a 22-attorney law firm focusing on insurance defense. I worked in the workers' compensation division and represented insurance companies and self-insured employers in workers' compensation insurance disputes. Workers' compensation is a highly regulated form of state

administrative law that is sometimes grouped with the larger practice area of labor law and insurance defense. Some of our clients included Disney, Wal-Mart, and the New York City Metropolitan Transportation Authority. Workers' Compensation work in New York City is volume based and this required me to attend anywhere from 50-70 hearings per week.

- On a daily basis, I conducted administrative trials in Workers' Compensation cases, which included direct and cross examination of claimants (workers' compensation 'plaintiffs') and lay witnesses. I utilized the New York Workers' Compensation Board's virtual hearing system and attended hearings and trials across New York State from Buffalo to Long Island. I also utilized New York's Electronic Case Filing System ("ECF") on a daily basis.
- I deposed licensed physicians on medical issues on a daily basis and prepared litigation-related documents, administrative filings, written deposition summations, and appeals and rebuttals to the New York State Workers' Compensation Board. This position required the ability to exercise independent judgment and to research, analyze and interpret complex legal issues, laws, regulations and policies, and to prepare legal opinions that are concise, well-reasoned, legally sound, and consistent with relevant precedent. It also required proficiency in legal research on Westlaw and Lexis. In my first year as a licensed attorney, I won an appeal in front of a New York Workers' Compensation Board Panel. *Matter of Jade Naseef*, N.Y. Workers' Comp., WCB: G2254363.
- I also was tasked with analyzing litigation budgets and performing settlement analyses. Workers' Compensation cases, depending on the year, can be capped, meaning claimants receive a set amount of compensation, or uncapped, meaning claimants can receive lifetime payments depending on the nature of their injuries. I worked individually and as a team with other attorneys in assessing the potential exposure different clients had in hundreds of cases, saving clients hundreds of thousands of dollars.
- I was required to advise my superiors on concerning questions, regulations, practices, and division responsibilities relative to legal aspects involved in application processes for statutorily mandated worker's compensation indemnity payments.
- I drafted case summaries and client communications on Workers' Compensation law developments. I routinely questioned witnesses through interviews and testimony, and evaluated documentary and testimonial evidence to demonstrate whether sufficient evidence existed to prove violation of New York State Laws. I conducted investigations into fraudulent claims. In instances where there were multiple possible insurance carriers at a location a worker was injured, I conducted complex investigations on insurance coverage issues in order to defend the interests of my clients.
- This was my first job out of law school and was great experience due to the high-volume work typically associated with New York City litigation firms. In this position, I had to prepare and handle every phase of workers' compensation cases and appear before and interact with judges on a daily basis. The most valuable takeaways from this position were how to be comfortable talking in front of judges, how to interact with adversarial attorneys, and how to manage a heavy case load and meet tight deadlines.
- Much of the work involved working out problems and disagreements with attorneys at the last minute or throughout the day prior to the hearing. Furthermore, it was not uncommon to receive assignments from senior attorneys that required substantial work on very short notice.

United States Securities and Exchange Commission-Division of Enforcement, New York, NY
Student Honors Intern-Trial Unit August 2016-April 2017

- I participated in the SEC's Student Honors Program with the Division of Enforcement's Trial Unit during my 3L year.
- I assisted the Division of Enforcement with federal securities enforcement proceedings in the Southern District of New York.
- I directly assisted my mentor attorneys with motions for federal venue transfer and researched materiality requirements for misstatements in public and private offering materials. This required knowledge of federal laws, regulations, policies and procedures that supported the mission of the SEC.
- I advised my superiors on concerning questions, regulations, practices, and federal regulator responsibilities relative to legal aspects involved in application processes for statutorily mandated company disclosures and compliance with other securities laws and regulations.
- I helped prepare litigation-related documents such as federal court filings with mentor attorney,

Senior Trial Counsel Haimavathi Marlier, and other senior trial attorneys in the Trial Unit. In addition, I researched multiple issues for multiple cases and cite checked precedent in complaint and answer drafts filed in federal court and administrative proceedings.

- I conducted legal research and prepared opinions on what civil charges could be brought against potential defendants in misstating material information in public offering materials, and researched procedural rules for federal venue requirements. *Sec. & Exch. Comm'n v. Contrarian Press, LLC*, 16-CV-6964 (VSB) (S.D.N.Y. Mar. 13, 2019).
- The SEC, as a civil enforcement body, has the power to sanction bad actors if they are found to be in violation of the federal securities laws. I reviewed proposed disciplinary and adverse actions involving market participants, to include removals, suspensions, letters of reprimand. These disciplinary measures instituted on some market participants included trading bans.
- This position required me to demonstrate proficiency in legal research on Westlaw and legal citation in federal securities matters. I began the internship in Fall of my 3L year, and chose to continue the internship into the spring semester because of the exciting nature of the work, the ability to work on novel or unexplored questions of law and policy, and because I knew after this internship that I wanted to work for the federal government.

Wexler, Burkhart, Hirschberg & Unger, LLP, Garden City, NY
Summer Associate June 2016-August 2016

- Wexler, Burkhardt, Hirschberg & Unger was a Long Island, NY law firm that focused primarily on representing broker-dealers in Financial Industry Regulatory Authority ("FINRA") arbitrations. The firm had a national clientele and I worked primarily on cases where broker-dealers were accused of churning client brokerage accounts, along with other complaints against broker-dealers.
- As a summer associate, I reviewed and provided legal advice on cases the partners were handling in front of FINRA which could result in decisions to discipline broker-dealers. I advised my superiors on concerning questions, regulations, practices, and statutory responsibilities relative to legal aspects involved in application processes for new broker-dealer firms and compliance with securities trading laws and regulations.
- I was also tasked with conducting legal research and preparing opinions on a wide variety of matters pertaining to the interpretation and application of laws, regulations, and other directives affecting the operations of the broker-dealer firms the law firm represented. This required me to research cases where FINRA arbitration panels had ruled on the issue previously and apply the facts of the law to the cases at hand.
- I drafted responses to requests for documents in investigations into whether sufficient evidence existed to prove violations of federal securities laws, and prepared litigation-related documents. I performed discovery production for arbitration proceedings and also drafted Wells Submissions in response to SEC Wells Notices. Responses to SEC Wells Notices involve federal civil litigation. While my name was not the attorney of record as this position was prior to me being licensed, this position required the ability to write clear and concise legal documents.

Central Park Group, LLC, New York, NY
Legal Intern January 2016-April 2016

- Central Park Group is a Registered Investment Adviser in Manhattan and provides alternative investments for high net worth individuals and smaller institutional investors. As a legal intern, I worked directly under the Chief Compliance Officer and reviewed and ensured Qualified Purchaser and Accredited Investor compliance for registered and exempt private equity funds, hedge funds, and fund-of-funds the firm advised. Whenever a new investor wished to invest in one of the funds Central Park Group advised, I would cross-reference the financial background checks completed on the individual investors with applicable laws to ensure they met the minimum income requirements under the federal securities laws. The main law that governed this employer was the Investment Company Act of 1940. A notable matter I worked on involved legal research regarding a high net worth minor who was a famous actor and known to be a brilliant intellectual, who wished to invest in one of the funds. At the time, there was no case law or statute indicating whether a Qualified Purchaser can be a minor. I recommended that the firm respectfully decline to take on the individual as an investor due to the potential legal problems created by having him as a client. This required me to exercise independent judgment and to research, analyze and interpret complex legal issues, laws, regulations

and policies, and to prepare legal opinions that are concise, well-reasoned, legally sound, and consistent with relevant precedent.

- I also performed conflict of interest trading checks on employees. I reviewed every employees' monthly brokerage statements and ensured they were not personally trading in any securities held by the funds the firm advised. This demonstrated my knowledge of and ability to apply knowledge of federal laws, regulations, policies and procedures to the situation at hand.

Newman & Morrison, LLP, New York, NY
Summer Associate March 2015-January 2016

- Newman & Morrison was a boutique corporate securities firm and I interned with them during my 1L year of law school. I drafted responses to requests for documents and evaluated documentary evidence in response to investigations into whether sufficient evidence exists to prove violations of federal securities laws. I was tasked with reviewing emails pursuant to a subpoena from the SEC, as well as determining whether information the SEC requested was privileged. I reviewed thousands of emails and documented whether the information requested was relevant to the subpoena or whether relevant information should not be produced due to its privileged nature. Creation of the privilege log required me to exercise independent judgment and to research, analyze and interpret complex legal issues, laws, regulations and policies, and to prepare legal opinions that are concise, well-reasoned, legally sound, and consistent with relevant precedent. In addition, I helped draft the pre-trial responses to the SEC investigation subpoenas which were the subject of the privilege log.
- I also provided the partners with advice and work products exhibiting knowledge, insight, and understanding of relevant law and facts. As a first-year intern, I was tasked with drafting Forms 4, 8-K, Schedule 13D/A, Schedule 13G for stock transactions for a publicly traded holding company. This required me to quickly familiarize myself with the various SEC filing forms and determine when each form should be used, demonstrating knowledge of and ability to apply knowledge of federal laws, regulations, policies and procedures. I also interacted with transfer agents and ensured stock sale transactions were completed according to the terms of agreement.

Professor Aaron Twerski, Brooklyn Law School, Brooklyn, NY
Research Assistant June 2015-September 2015

- I assisted Brooklyn Law School Professor Aaron Twerski draft the new edition of products liability casebook (Products Liability: Problems & Process (Aspen Casebook) 8th Edition). I provided him with advice and work products exhibiting knowledge, insight, and understanding of relevant products liability law.
- I read all the cases that had been decided on a particular issue, then recommend to the professor new cases that I thought should be included in the casebook as major cases.
- I reviewed the relevant literature on particular aspects of products liability law over the past four years to see whether new cases or law review articles should be discussed at length or simply be noted. I provided the professor with recommendations on cases I thought would be relevant from a legal development perspective. This required the ability to communicate orally and in writing, to brief, explain, advocate, represent, train, instruct, in an effective manner, logically and concisely to my supervisor. I also wrote note material for those cases of lesser interest but still worthy of bringing to the attention of students that I found interesting or novel.

LEADERSHIP EXPERIENCE/INTERESTS

- Former NCAA Football Division II quarterback-Central Washington University, 2008-2012.

BAR ASSOCIATION MEMBERSHIP

- Florida Bar Association; New York State Bar Association; District of Columbia Bar Association; Canadian-American Bar Association.

David Wiesner
Georgetown University Law Center
Cumulative GPA: 3.3

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Complex Securities Investigations	Kevin Muhlendorf, Thomas Hall	A-	2	
Disclosure Under the Federal Securities Laws	Stephanie Tsacoumis	A-	2	
Global Securities Offerings	Michael Rosenthall, Eloise Quarles	B+	2	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Rethinking the Role of the SEC		B	2	
SEC Regulation of Financial Institutions and Securities Markets		B	2	
Securities Regulation		B	2	

Fall 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Energy Trading and Market Regulation	W. Massey, D. Santa	B+	2	
The Essentials of Fintech Law	G. Scopino	B+	2	

Spring 2020

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Basic Accounting for Lawyers	J. Bethard	B+	2	
Implementation of Financial Reform Legislation	J.P. Buffa	B+	2	
International Business Litigation in Federal Practice	M. Paz, B. Benitez	B+	2	
Takeovers, Mergers, and Acquisitions	T. Chan	B+	2	

Grading System Description
0-4.0

David Wiesner
Brooklyn Law School
Cumulative GPA: 3.376

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Fundamentals of Law Practice	Noah Kupferberg	B-	2	
Criminal Law	Neil P. Cohen	B+	3	
Torts	Anita Bernstein	B+	4	
Civil Procedure	Elizabeth Schneider	A	5	

Sem GPA 3.475

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Contracts	Winnie Taylor	B+	5	
Fundamentals of Law Practice 2	Noah Kupferberg	B+	2	
Constitutional Law	Joel Gora	A	5	
Property	Brian Lee	B+	4	

Sem GPA 3.539

Summer 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Professional Responsibility	Michael Ross	B-	2	
Family Law	Anita Bernstein	B+	3	
Interviewing and Counseling	Gary Shultze	A-	2	

Sem GPA 3.239

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
International Sales Law	Jack Wiener	A-	2	
Brooklyn Journal of International Law	Brian Lee	P	2	
Government Advocacy Seminar	Nicholas Allard	A	2	
First Amendment Law	Joel Gora	B-	3	
Corporations	Dana Brakman-Reiser	C+	4	

Sem GPA 2.970

Winter 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Boot Camp	Deloitte	P	1	

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Securities Regulation	Roberta Karmel	A-	3
International Business Transactions	Robin Effrom	A-	3
Clinic-Civil Practice Externship	Jodi Balsam	P	3
Brooklyn Journal of International Law	Brian Lee	P	1
Clinic-Learning From Practice Seminar	Chantouli Huq	A-	1

Sem GPA 3.670

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Evidence	Jocelyn Simonsen	B-	4	
Clinic-Civil Practice Externship	Securities and Exchange Commission	P	3	
Clinic-Civil Practice Securities Regulation	Barry Hochessler	A-	1	
Securities Fraud and Regulatory Enforcement	Earnest Badway	A-	2	
Brooklyn Journal of International Law	Brian Lee	P	1	

Winter 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intensive Trial Advocacy	Camille Abate	A	2	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Civil Externship Semester-Litigation Skills	Jodi Balsam	B+	1	
Complex Securities Litigation	David Woll	B	2	
Criminal Procedure I	Miriam Baer	A-	3	
Civil Practice Externship	Securities and Exchange Commission	P	3	
Brooklyn Journal of international Law	Brian Lee	P	1	

Grading System Description
Out of 4.0

September 02, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I have been asked by David Weisner to write a letter of recommendation on his behalf. David has informed me that he is applying for a clerkship in your court. I am pleased to recommend him to you.

David worked closely with me when I was working on the eighth edition of our Products Liability casebook published by Aspen Publishers. Though David was not a student in any of the classes that I taught, he applied to be my research assistant on this project. His task was to read all the cases that had been decided on a particular aspect of products liability law over the past four years. He was then to recommend to me new cases that should be included in the casebook as major cases and to write note material for those cases of lesser interest but still worthy of bringing to the attention of students. He was also to review the literature to see whether new law review articles should either be discussed at some length or simply be noted. David did an excellent job. His work was professional and thoughtful. It was very useful to me. My experience with him was very positive. He writes well and his research abilities are excellent. I am pleased to recommend him to you.

Sincerely,

Aaron D. Twerski
Irwin and Jill Cohen Professor of Law

Aaron Twerski - aaron.twerski@brooklaw.edu - (718) 780-0623

September 02, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr.
U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

David Weisner has asked me to provide a recommendation to judges for a clerkship position and I am happy to do so. Mr. Weisner was a student in my Securities Regulation class in the spring of 2016 and received a grade of A-. This was a very competitive class so that was an excellent grade.

I have had several conversations with Mr. Weisner about his career plans since he is especially interested in securities litigation. He believes that a clerkship would greatly enhance his professional skills and I agree. In my opinion, he would apply himself diligently to the work of a judge's clerk and make every effort to produce work of high quality. He is intelligent and hard working.

I have read the Note that Mr. Weisner prepared for the Brooklyn Journal of International Law and also two shorter pieces that he wrote. His writing is of a high caliber and his work was well researched.

Mr. Weisner is a personable young man and he is likely to be an asset to a judge in dealing with other clerks and litigants and their attorneys.

If you would like any more information in connection with this recommendation, please call me.

Sincerely yours,

Roberta S. Karmel
Centennial Professor of Law

Roberta Karmel - roberta.karmel@brooklaw.edu - 718-780-7946

BRYAN JACKSON, Plaintiff
v.
LOLO MATALASI MOLIGA, in his Individual and official Capacities, and THE GOVERNMENT OF AMERICAN SAMOA, Defendants

CA No. 19-20

STEVEN JAY PINCUS HUETER, Plaintiff
v.
LOLO MATALASI MOLIGA, in his Individual and official Capacities, and THE GOVERNMENT OF AMERICAN SAMOA, Defendants

CA No. 21-20

High Court of American Samoa
Trial Division

Before KRUSE, Chief Justice, MAMEA, Chief Associate Judge, and MUASAU, Associate Judge.

Counsel: Plaintiff Bryan Jackson, *Pro se*.
Plaintiff Steven Jay Pincus Hueter, *Pro se*.
For Defendant, Alexandra Zirschky, Assistant Attorney General.

ORDER DENYING PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

BACKGROUND

In December 2019, a novel (new) coronavirus known as SARS-CoV-2 was first detected in Wuhan, Hubei Province, People's Republic of China. The disease caused by SARS-CoV-2 is known as the Coronavirus disease 2019 ("COVID-19"). On March 11, 2020, the World Health Organization, alarmed by the levels of spread and severity of COVID-19, declared COVID-19 a pandemic.[1] Like many states and territories around the world, American Samoa implemented a series of emergency declarations to limit the spread

[1] Timeline of WHO's Response to COVID-19, June 30, 2020 (last accessed July 22, 2020). *See* https://www.who.int/news-room/detail/29-06-2020-covidtimeline.

of COVID–19. COVID-19 is a communicable disease and infected persons may be asymptomatic and unwittingly infect others.[2] As of the writing of this opinion, there are more than 14,765,256 confirmed cases and 612,054 deaths globally attributed to COVID-19.[3] The United States has over 3,882,167 cases and 132,056 deaths.[4] To date, American Samoa remains one of the last places globally, and the last U.S. state or territory with no confirmed COVID-19 cases.[5]

EMERGENCY DECLARATIONS

On March 13, 2020, President Donald J. Trump declared a national emergency concerning the COVID-19 outbreak, noting that "[t]he spread of COVID-19 within our Nation's communities threatens to strain our Nation's healthcare systems."[6]

On March 18, 2020, the American Samoa Government (the "Government") issued a "Declaration of Continued Public Health Emergency and State of Emergency for COVID-19" (the "First Declaration") signed by the American Samoa Governor (the "Governor," together with the Government "Defendants"), which *inter alia*, suspended public gatherings, encouraged social distancing, and limited business hours.

On March 20, 2020, the Government issued an "Amended Declaration" (the "Amended Declaration"), effective for thirty days

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[2] *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.) (Roberts, C.J., concurring); *See Carmichael v. Ige*, No. CV 20-00273 JAO-WRP, 2020 WL 3630738, at *3 (D. Haw. July 2, 2020).

[3] *See* https://covid19.who.int/ (last accessed July 22, 2020).

[4] *See* https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last accessed July 22, 2020).

[5] *Id.* As of July 22, 2020, the Compact States of The Federated States of Micronesia, Palau, and the Marshall Islands also record no confirmed COVID-19 cases according to the Centers for Disease Control.

[6] *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID 19) Outbreak*, WhiteHouse.gov (Mar. 13, 2020), https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak.

beginning March 23, 2020, signed by the Governor, *inter alia*, closing all public and private schools, American Samoa Community College and day care centers.

On April 1, 2020, the Government issued a "Third Amended Declaration" (the "Third Amended Declaration"), effective for thirty days, signed by the Governor, *inter alia*, reiterating the suspension of public gatherings and suspending all church meetings, services, and events until further notice..

On April 30, 2020, the Government issued a "Fourth Amended Declaration" (the "Fourth Amended Declaration"), effective for thirty days, signed by the Governor, *inter alia*, reiterating in large part the restrictions in the Third Amended Declaration.

On May 30, 2020, the Government issued a "Fifth Amended Declaration" (the "Fifth Amended Declaration," collectively with other declarations the "Emergency Declarations"), effective for thirty days, signed by the Governor, *inter alia*, stating that all public gatherings, including religious worship, of no more than 150 people would be permitted.

FACTUAL HISTORY

Plaintiff Bryan Jackson ("Jackson"), a U.S. Citizen and resident of the Territory, challenges Defendants' Emergency Declarations, alleging four counts of violation of his civil and constitutional rights with respect to his First Amendment freedoms of religion and assembly.

Plaintiff Steven Jay Pincus Hueter ("Hueter," together with Jackson "Plaintiffs"), a U.S. Citizen and resident of the Territory, challenges the Defendants' Emergency Declarations, alleging four counts of violation of his civil and constitutional rights with respect to his First Amendment freedoms of religion and assembly.

Plaintiffs, in their separate actions, seek preliminary injunctions, declaratory relief, nominal damages of $1.00 each, and punitive damages of $4,000,000.00 each. Hueter also seeks restitution and a writ of mandamus. While Plaintiffs have emphasized the uniqueness of their respective claims, each case challenges the same activity by Defendants and both raise common issues of constitutional interpretation. For this reason, we elected to hear both Plaintiffs' applications for injunctive relief concurrently on July 10, 2020.

Plaintiffs' applications for preliminary injunction are denied for the following reasons.

LEGAL STANDARD

Under A.S.C.A. §43.1301(j), "[s]ufficient grounds for a preliminary injunction means: (1) there is a substantial likelihood that the applicant will prevail at trial on the merits and that a permanent injunction will be issued against an the opposing party; and (2) great or irreparable harm will result to the applicant before a full and final trial can be fairly held on whether a permanent injunction should issue."[7]

"A preliminary injunction is an extraordinary remedy and is granted only when clearly warranted."[8] A preliminary injunction is never awarded as a right.[9] "[Injunctive] power is used where the legal rights at issue are indisputably clear and, even then, sparingly and only in the most critical and exigent circumstances."[10]

DISCUSSION

1. Great or Irreparable Harm

"Great or irreparable harm standard is a fact-intensive determination. Relative detriments to the parties are commonly considered and balanced."[11] If a party does not meet the burden of showing irreparable harm before trial when applying for a preliminary injunction, a court need not consider the issue of likelihood of success.[12] "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. V. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014)(citation omitted).

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[7] A.S.C.A. §43.1301(j). *See Talauega v. Mulipola*, 22 A.S.R. 7, 8 n.1 (Land & Titles Div. 1992)(internal quotations omitted).

[8] *Le Vaomatua v. Am. Samoa Gov't.*, 23 A.S.R.2d 11 (Land & Titles Div. 1992).

[9] *Yakus v. United States*, 321 U.S. 414, 440 (1944); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008); *Munaf v. Geren*, 553 U.S. 674 (2008).

[10] *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020) (mem.) (Roberts, C.J., concurring). *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice § 17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

[11] *Drabble v. Mikaele*, 8 A.S.R.3d (Trial Div. 2004); *Gurr v. Scratch*, 22 A.S.R.2d 103 (Trial Div. 1992).

[12] *Pritchard v. Estate of Fui'availiili*, 29 A.S.R.2d 112 (1995).

Hueter argues it is "reasonably self-evident that there is irreparable harm that cannot be simply and immediately reduced to a financial or pecuniary value for the violation of Plaintiff [Hueter's] civil and constitutional rights by the Defendants." Hueter has not articulated or pled any factual allegations that demonstrate a continuing harm and we disagree that any future harm he may suffer is "reasonably self-evident."

At the July 10, 2020 hearing, Hueter orally moved for a renewed motion for temporary restraining order and stated that it was his intention to attend a three-person religious service with a pastor and the pastor's wife at the Samoan Christian Unity Church in Tafuna after 9:00 PM and before 5:00 AM. Hueter argued that the Emergency Declarations' restrictions on religious worship between the hours of 9:00 PM and 5:00 AM are unconstitutional. Although we summarily denied Hueter's oral renewed motion, we take note that Hueter is appearing *pro se*, and is not well-versed with the legal technicalities of the Trial Court Rules of Civil Procedure. Furthermore, in an effort to mitigate the delays in litigation caused by Hueter's serial filing of voluminous interlocutory appeals, amended complaints, motions for reconsideration, motions for clarification, and renewed requests for temporary restraining orders all of which strain the resources of the Court, we have elected to construe Hueter's application liberally and will address the constitutionality of the Emergency Declarations as they relate to Hueter's recent desire to attend church after hours.

Jackson claims that Defendants' public gathering restrictions have already caused him to suffer irreparable harm. Due to the public gathering restrictions, his daughter's high school graduation ceremony did not allow for in-person attendance and provided a low-quality live videocast as the only alternative. Jackson argues that if Defendants are not enjoined, he will be irreparably harmed by being prohibited from attending a similar graduation ceremony for another daughter who is currently in middle school.

The theory underpinning both Plaintiffs applications is that the Territorial borders are have been closed longer than the two-week incubation period for COVID-19 and thus, American Samoa is COVID-19 free. Plaintiffs contend that American Samoa's status as COVID-19 free renders the public gathering restrictions unconstitutional. We decline to follow this line of reasoning.

Both Plaintiffs fail to address the fact that goods and people are still moving in and out of our borders. The Port of Pago Pago is still receiving ocean freight, which requires harbor pilots[13] and physicians[14] to board and navigate vessels in and out of the harbor. Passengers aboard Federal Emergency Management Agency flights are still landing at Pago Pago International Airport and entering the Territory. The Territory is still receiving air freight, there is no shortage of imported food in the local markets. Multiple repatriation flights exchanging residents of American Samoa and the Independent State of Samoa have taken place and are predicted to continue. Perhaps most importantly, our vital link with the mainland through the U.S. Postal Service has remained operational since the onset of the COVID-19 pandemic.

Undoubtedly, many of these transactions require close contact between Territorial residents and individuals coming from off-island locales. The Emergency Declarations put in place testing protocols for any necessary travel into the Territory, however, such protocols can in no way completely eliminate the threat that COVID-19 may be transmitted by asymptomatic carriers. While Hawaiian Airlines has indeed placed a moratorium on passenger flights between Pago Pago International Airport and Honolulu, this activity in no way indicates the flow of people and goods into the Territory has been completely halted. Absent ongoing and comprehensive testing in the Territory, we cannot assume COVID-19 is not already present in an undetected form. As such, contentions that the Territory is under an effective and absolute quarantine are without merit. Any infringement of Plaintiffs' individual freedoms is tenuous when compared to the threat COVID-19 poses to the Territory's residents.

The history of American Samoa and neighboring Samoa's ("Western Samoa") different responses to past epidemics highlight our islands' unfortunate vulnerability to the introduction of foreign diseases. During the 1918 Spanish Influenza ("Spanish Flu") epidemic, on the initiative of Commander John M. Poyer, American Samoa successfully instituted a strict maritime quarantine which has been referred to by historians as "American Isolationism at its most discourteous extreme."[15] The Naval Government at the time

[13] 46 U.S.C. §8502.

[14] Fifth Amended Declaration, p.5 §15 et seq.; Sixth Amended Declaration, p.5 §14 et seq.

[15] Alfred Crosby, *America's Forgotten Pandemic*, (Cambridge 2003), at 238 *citing* National Archives, San Francisco, R.G. 284, Subject Files 1900-42, Medical Reports, Gov. Poyer to Read-Adm. R.M.

prohibited the transfer of mail between American and Western Samoa and created a patrol system to prevent the landing of any boats on Tutuila.[16] However, Western Samoa, failed to implement any such programs.[17] It took a matter of only weeks in Western Samoa for 22% of the population, nearly one in four people, to die from the Spanish Flu. Many of the deaths in Western Samoa were due to simple starvation as the loss of life paralyzed the usual procedures of food procurement, preparation, and distribution.[18] Meanwhile, American Samoa did not register a single case.[19]

> "[T]he effect of the naval quarantine during the flu epidemic, which was world-wide, was so good and so efficient that although over 4,000 people died of flu in British [Western] Samoa, not a single person had the flu in American Samoa."[20]

Doyle, no address for sender, 25 January 1919; Mason Mitchell to Gov. Poyer, Apia, 7 December 1918; NA, Wellington, New Zealand, Island Territories Department, File 8/10, Samoan Epidemic Commission, Lieutenant John Allen to Administrator of Samoa, Apia, 27 November 1918.

[16] *Id.* at 237.

[17] Sandra M. Thomkins, *Influenza Epidemic of 1918-19 in Western Samoa*, 27 THE J. OF PACIFIC HISTORY 181, 184-85 (1992).

[18] *Id.* at 181.

[19] Crosby *supra* n. 15, at 239. "When Poyer departed the islands in June 1919, his successor proclaimed to a largely Samoan audience that the retiring Governor's greatest achievements had been the water works, the new high school, and, above all, the strict quarantine against the Spanish Influenza: 'He saved your lives and the lives of your brothers and your wives; and thanks to his wisdom you are not bowed down in anguish over the deaths of your children.'" *Pago Pago O Le Fa'atonu*, vol. 17 (July 1919).

[20] Senator Hiram Bingham (Conn.), Joint Committee on Territories and Insular Possessions of the Senate and Committee on Insular Affairs of the House of Representatives, January 17, 1928, available at https://books.google.as/books?id=_3MASEgpafUC&pg=PA41&lpg=PA41&dq=AMERICAN+SAMOA+COPRA+TAX&source=bl&ots=0M6cVzsq4Y&sig=ACfU3U2O6Vyaw-mJZsuCFkH1ko7aBvYX7A&hl=en&sa=X&ved=2ahUKEwi6jIiG8azqAhVAHTQIHZu-Bf8Q6AEwDHoECAoQAQ#v=onepage&q=AMERICAN%20SAMOA%20COPRA%20TAX&f=false

The current Emergency Declarations are lenient when compared to those the Government implemented in 1918, yet, proving to be just as effective in preventing unnecessary death. Taking into account the community's interest in preserving its health and well-being against the individual freedoms of two U.S. Citizens, the balance of equities weighs heavily in Defendants' favor.

2. Likelihood of Success on the Merits

Plaintiffs have failed to show that they have a strong likelihood of success on the merits of their respective claims. A preliminary injunction "will not be granted unless upon a showing of probable success...."[21] A plaintiff must "raise questions so serious and difficult as to call for more deliberate consideration, or at least demonstrate a fair question for litigation."[22]

"The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. When those officials undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad."[23] Unlike Defendants, unelected judges are not equipped to with the competence and expertise to assess scientific matters of public health.[24] It is not the Court's role to second-guess Territorial officials on such matters.

The Defendants' Emergency Declarations have been declared pursuant to A.S.C.A. §13.0307 et seq., which provides, in relevant part:

> A public health emergency may be declared by the Governor, at the director's recommendation, upon

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[21] *Samoa Aviation, Inc. v. Bendall*, 28 A.S.R.2d 101, 103 (Trial Div. 1995), *citing Societe Comptoir De L'indus. v. Alexander's Dept. Store*, 299 F.2d 33, 35 (2d Cir. 1962).

[22] *Samoa Aviation, Inc. v. Am. Samoa Gov't.*, 7 A.S.R.3d 191, 192 (Trial Div. 2003).

[23] *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020)(*citing Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905); *Marshall v. United States*, 414 U.S. 417, 427 (1974)(internal quotations omitted).

[24] *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545, (1985); *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613, 1614 (2020).

> the event or occurrence of a public health emergency, or the imminent threat of a public health emergency. Prior to such a declaration, the Governor and/or Director, may consult with the Territorial Office of Homeland Security, ASG agencies, federal agencies and may consult with any additional public health or other experts as needed.[25]

Although American Samoa's Emergency Declarations place restrictions on the right to peaceably assemble and the number of individuals who can gather at places of worship, the emergency restrictions appear to fall within the parameters of the Free Exercise Clause of the First Amendment.

The First Amendment of the U.S. Constitution and Article I, Section 1 of the American Samoa Constitution afford those present in American Samoa the freedom of religious expression and assembly.[26] In Constitutional interpretation, these rights are synonymous with the term "Free Exercise Clause." "The protections afforded by the First Amendment... are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution."[27] "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."[28] "To satisfy the commands of the First Amendment, a law restrictive of religious practice must

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[25] A.S.C.A. §13.0307(a).

[26] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.; "There shall be separation of church and government, and no law shall be enacted
respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." REV. CONST. AM. SAMOA art I, §1.

[27] *Virginia v. Black*, 538 U.S. 343, 358 (2003). *See, e.g. Schenck v. United States*, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[28] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993).

advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[29]

The initial two Emergency Declarations, which restricted public gatherings, made no specific mention of restrictions on religious worship. It was not until the Third and Fourth Amended Declarations that any restrictions regarding religious gatherings were indistinctly included with the suspension of public gatherings. The Fifth Amended Declaration likewise made no distinction between religious worship and public gatherings. Furthermore, the Emergency Declarations treat more leniently other, distinct activities, such as restrictions on business hours and public occupancy for restaurants, fast food establishments, bars, and nightclubs.

The Emergency Declarations have evolved over time and appear to have been recalibrated depending on the situation at the time of issuance. Early Emergency Declarations outright suspended all public gatherings and worship services, while later declarations relaxed restrictions, allowing public gatherings of up to 150 people. Defendants point to numerous factors as bases for the Emergency Declarations: the limited number of test kits available, limited availability of hospital beds, the potential for medication and health supply shortages, the asymptomatic nature of this disease, etc.

The global COVID-19 pandemic has created a situation on the ground that is changing on a day-to-day basis, limited only to the speed at which we can receive information from off-island and the from the scientific and medical communities here in American Samoa. According to Johns Hopkins University, the United States broke its own record with the number of COVID-19 cases diagnosed four times between July 7, 2020 and July 14, 2020.[30]

Therefore, while the Emergency Declarations' restrictions on public gatherings appear to curtail Plaintiffs' individual freedom to be physically present at a religious service or public gatherings, protecting a living community from preventable death is

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[29] *Id. See also Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017).

[30] COVID-19 Dashboard by the Center for Systems Science and Engineering (CSSE) at Johns Hopkins University (JHU), available https://gisanddata.maps.arcgis.com/apps/opsdashboard/index.html#/bda7594740fd40299423467b48e9ecf6, last accessed July 28, 2020.

undoubtedly a compelling governmental interest. Given that such measures have in no way have prevented religious organizations from broadcasting their services to followers via the internet and over television, such measures are narrowly tailored.[31] Any infringement of Plaintiffs' freedoms pales when compared to the threat COVID-19 poses to the Territory's residents. In the context of the Pandemic, the people's safety and health is properly left to those "politically accountable officials" to safeguard and not the courts by way of provisional injunctive relief. With the rapidly evolving situation on the mainland, we are not persuaded that Plaintiffs have shown "substantial likelihood of success" on the merits.

Finally, "A.S.C.A. §41.1309 requires a party seeking a preliminary injunction to post a security to cover the costs and damages suffered by a party wrongfully enjoined or restrained prior to the opportunity for a trial on the merits."[32] The Plaintiffs have shown neither the willingness nor the ability to quantify and post the required security.

ORDER

Given the foregoing, the Court is not persuaded that either Plaintiff has a strong likelihood of success on the merits, or that great or irreparable harm will result absent the issuance of a preliminary injunction. Plaintiffs' applications for preliminary injunction are denied.

It is so ordered.

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[31] See Legacy Church, Inc. v. Kunkel, No. CIV 20-0327 JB\SCY, 2020 WL 1905586, at *36 (D.N.M. Apr. 17, 2020) (Finding New Mexico's Public Health Emergency Order (4-11-20-PHO), which restricted places of worship from gathering more than five people within a single room or connected space was narrowly tailored as it allowed religious organizations to broadcast their services to followers via the internet and over television).

[32] A.S.C.A. §41.1309. *See Le Vaomatua v. Am. Samoa Gov't.*, 23 A.S.R.2d at 15.